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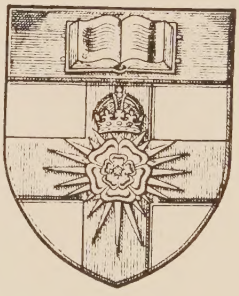

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329N

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DETERMINED BY THE

QUEEN'S BENCH DIVISION

AND BY THE

COMMON PLEAS AND EXCHEQUER DIVISIONS

OF THE

HIGH COURT OF JUSTICE,

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM,

AND BY THE

COURT FOR CROWN CASES RESERVED.

EDITED BY

JAMES REDFOORD BULWER, Q.C.

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

AND BY THE

COMMON PLEAS AND EXCHEQUER DIVISIONS

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLIV VICTORIA.

[IN THE COURT OF APPEAL.]

1880

WARBURTON, APPELLANT; HEYWORTH, RESPONDENT.

Nov. 17.

(C. A.)
Q. B. D.

Master and Servant—Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *s.* 11—*Contract of Service—Wages due but not payable—Piece Work—Forfeiture of Wages—Women.*

A weaver, a woman subject to the provisions of the Factory Acts, was employed at a mill in which amongst the rules were rule 15, that no person shall leave his or her work without giving fourteen days' previous notice, such notice to be given on a Saturday, and rule 16, that any person leaving without giving such notice "shall forfeit all wages then due, or earned, or unpaid." She was paid by the piece, and all work done was booked up at three o'clock on the Wednesday afternoon in each week, and paid for on the following Saturday, all work booked after three o'clock on the Wednesday afternoon being carried forward to the following week. She left the mill before three o'clock on a Wednesday afternoon without giving the required notice, having previously carried in and had booked certain work which she had completed. On the following Saturday she applied for the wages due at the time she left and when she had completed her work, but payment was refused on the ground that the same

1880

WARBURTON v. HEYWORTH.

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were forfeited by rules 15 and 16. No claim was, however, made for damage sustained by the employer.

The 11th section of the Employers and Workmen Act, 1875, enacts that "in the case of a child, young person, or woman, subject to the provisions of the Factory Acts, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage, if any, which the employer may have sustained by reason of such absence or leaving work":—

Held, that the above facts did not shew a weekly hiring at weekly wages, but shewed that the price for the work done and booked when the weaver left on the Wednesday was then earned and due, though not then payable, and that the same would have been forfeited by rules 15 and 16, but that as there was no damage and the weaver was a woman subject to the Factory Acts she was protected by the said 11th section, and could not be deprived of what she had so earned.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty session at Blackburn, in the county of Lancaster, on the 20th of November, 1879, the justices heard and dismissed a complaint preferred by the appellant against the respondent, under s. 4 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), charging that the respondent, being the employer of the appellant in the trade or business of a cotton manufacturer under a certain contract of service, did refuse to pay to the appellant the sum of 13*s.* 4*d.*, being wages earned by her while in the said respondent's employ.

The case stated that upon the hearing of the complaint,

4. It was proved on the part of the appellant, and found as a fact, that she was a weaver in the employ of the respondent, who is a power loom cloth manufacturer in the borough of Blackburn, and that she was paid by the piece.

5. That the rules which were annexed to the case were in force in the mill of the respondent. (1)

(1) The rules annexed to the case contained, inter alia, the following, viz.,

"15. No person shall leave his or her work for any cause whatever, without giving fourteen days' previous notice, such notice to be given in the warehouse on a Saturday. The same notice shall be given by the master, except in the cases provided for or referred to by rules 3, 4, 5, 6, and 12."

"16. Any person leaving his or her work without giving the notice required by rule 15, or before the expiration thereof, shall forfeit and lose all wages then due, or earned, or unpaid, and shall also be liable to be proceeded against according to law, as if there had been no such forfeiture."

"18. All fines, forfeits, deductions, or sums payable under or by virtue of

6. That all work done at the respondent's mill is booked up at three o'clock on the Wednesday afternoon in each week, and paid for on the following Saturday; all work booked after three o'clock on the Wednesday afternoon being carried forward to the following week.

7. That on Wednesday, the 29th of October, 1879, at a quarter past twelve o'clock at noon, the appellant carried the cuts she had completed into the warehouse, and had them booked, and then returned to her looms until half-past twelve o'clock at noon, when the works stopped for dinner, and that she then left her work without having given the required notice.

8. That on the following Saturday the appellant applied to the respondent for 13*s.* 4*d.*, the amount of wages which she alleged to be due at the time she left, and when she had completed the cuts in her looms, but payment was refused on the ground that they were forfeited by rules 15 and 16.

9. That the appellant had admitted that she had left her work without giving the required notice, and that she had offered the following week to return and serve her notice, but the respondent refused to allow her to do so, her looms having been given to another weaver at three o'clock on the Wednesday afternoon (the day she left).

10. That the average amount of wages earned in one week in the respondent's mill was 16*s.* 6*d.*

11. That there was no claim made by the respondent against the appellant for damage or loss sustained in consequence of her having left her work without notice.

12. It was contended on the part of the appellant, that she had completed her week at the time she took in her cuts at a quarter past twelve on the Wednesday noon, and that immediately thereupon her wages became due, and that by s. 11 of the Employers and Workmen Act, 1875, the respondent had no right to stop or make any deduction from the appellant's wages then due for work done on account of her having left her work without notice,

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these rules, or of any of them, may be deducted and retained from any wages due or earned, and to become due for or in respect of any work done, within the space of twenty-eight days next preceeding the day on which the fine, forfeit, deduction, or sum payable shall be imposed, claimed, or made known."

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except the amount of damage which the respondent had sustained thereby.

13. It was contended on the part of the respondent, first, that as the week ended at three o'clock on the Wednesday afternoon, and not at a quarter past twelve at noon, the appellant, by leaving her work before the expiration of the current week and without notice, had forfeited any right to be paid for the work done up to the time of her leaving, as the hiring was a weekly one; and the cases of *Saunders* v. *Whittle* (1) and *Gregson* v. *Watson* (2) were referred to and relied on by the respondent.

Secondly, That the case did not come within the meaning of the 11th section of the Employers and Workmen Act, 1875, as the respondent claimed neither a deduction nor set-off against the claim for wages or other sum due, as no sum was due to the appellant; and that the forfeiture spoken of in the statute was for a temporary absence or leaving work only, and did not apply to a total rescission of the contract by leaving the same before the term of service was completed.

And, thirdly, That the appellant having voluntarily left her service without notice she could not recover for the work done during the broken period of her hiring, and that in this case there were no wages due to the appellant until she had completed her week at three o'clock on the Wednesday afternoon, and she had therefore no claim in the words of the statute "for wages or other sum due for work done before such absence or leaving work."

14. The justices stated that they found that the hiring was a weekly one and that the appellant was a woman subject to the provisions of the Factory Acts.

15. The justices also stated that being of opinion that the week ended at three o'clock on the Wednesday afternoon, and not at a quarter-past twelve at noon, also that the appellant had not completed her week when she left her work without notice, and therefore that no wages were then due to her, they dismissed the complaint as before stated.

16. The question of law arising on the above statement therefore was whether in point of law the judgment for the respondent was correct.

(1) 33 L. T. (N.S.) 816. (2) 34 L. T. (N.S.) 143.

The case was heard during last Hilary Sittings by the Queen's Bench Division, when that Court being of opinion that the point in question had been decided by the case of *Gregson* v. *Watson* (1) dismissed the appeal, but gave the appellant leave to appeal.

The appellant accordingly appealed.

Hopwood, Q.C., and *R. S. Wright*, for the appellant. The case comes within s. 11 of the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), which enacts as follows: "In the case of a child, young person, or woman, subject to the provisions of the Factory Acts, 1833 to 1874, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work except to the amount of the damage (if any) which the employer may have sustained by reason of such absence or leaving work." The appellant was paid by piece-work, so that even if the whole contract was not completed still when she had done a piece she had earned the price to be paid for it, which was then due, although by the rules of the mill it was not payable until the Saturday. It is impossible therefore to say that there was not here a forfeiture, and that but for that she would have been entitled to the sum due for the work she had done. In *Gregson* v. *Watson* (1) the county court judge found as fact that the hiring was a weekly one, and that the wages were not due.

[BRETT, L.J. Are we bound by the finding that the hiring was a weekly one?]

That statement in the case is only a statement of the conclusion the justices came to from the facts, and this Court is therefore at liberty to draw a different conclusion from them.

[COTTON, L.J. If her wages had never become due, that is to say, if they were weekly wages and she left before the week was ended, then there would be no forfeiture, and the 11th section of the Statute would not apply.]

Here her price of the work had become due when the work was done and booked up, and but for rule 16 the appellant would have been entitled to have been paid for it; and it is because she is of

(1) 34 L. T. (N.S.) 143.

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that class which the legislature intended to protect that she is relieved of such forfeiture by s. 11 of the Act.

Gully, Q.C., and *Attenborough*, for the respondent. The 11th section of 38 & 39 Vict. c. 90, was not intended to alter the ordinary relation of master and servant.

[BRETT, L.J. If the employer cannot get rid of the claim for wages in this case without relying on rules 15 and 16, then the 11th section applies.]

Yes, but no wages were due until three o'clock on the Wednesday afternoon, when the week ended. Carrying the cuts into the warehouse is only to ascertain the amount of work done, and so enable the computation to be made of the wages which may be earned. The wages instead of being computed by the day are computed by the piece, but the hiring is a weekly one; it resembles therefore *Saunders* v. *Whittle* (1), where the workman was hired by the week, but his wages were to be at so much per hour, and it was held that as he left the service before the end of the week he had no right to wages which would only have been earned at the end of the week. *Walsh* v. *Walley* (2) was the case in which a weaver was hired as a weekly servant, but his wages were regulated as here by the number of pieces which, from time to time, he wove and delivered—and his wages were ascertained at noon on Thursday in each week. He left without notice on a Friday, having earned 7*s.* since the noon of Thursday. The only question then was whether in the construction of the rules at the mill he had forfeited the wages due on the Thursday. And the Court held that he had forfeited them, as well as the 7*s.* earned since Thursday, which last, as said there by Cockburn, C.J., was forfeited by the general law. If the workman was barred there from recovering that 7*s.*, so equally ought the appellant to be unable to recover what she claims here.

Hopwood, Q.C., was not called on to reply.

BAGGALLAY, L.J. If I had seen that there had been a simple finding by the justices as a matter of fact that the hiring here was a weekly one, I would have hesitated before I adopted a view which was inconsistent with such finding, but where the justices

(1) 33 L. T. (N.S.) 816. (2) Law Rep. 9 Q. B. 367.

have stated, as they have done here, certain facts, and then have stated certain findings, I consider such findings to be only a conclusion of law which they have drawn from these facts. Now the justices say that they found that the hiring was a weekly one, and in one sense it was, that is to say the payment was to be weekly. It appears from what is previously stated, that what is so paid is regulated by the work done. The appellant was paid by the piece, and all work done was booked up on the Wednesday afternoon, and paid for on the following Saturday. I find, however, no reference to booking in any of the rules, and I think the booking was for the convenience of the proprietor of the mill. Then the contract of service was to continue, and no one was to leave without giving fourteen days' previous notice, and such notice was to be given on a Saturday, so that the finding of the justices is inconsistent with a weekly hiring terminating on a Wednesday. The opinion that I have formed from the facts in this case is that the wages were earned by the appellant before the time when she absented herself from the service. If so earned it is not denied on the part of the respondent that the payment could not be refused without a forfeiture within the meaning of the Employers and Workmen Act, 1875. On the other hand, if the hiring were a weekly one, and she had absented herself from the service before the end of the week, no wages would have been due. The cases which have been cited do not apply. In *Gregson* v. *Watson* (1) the Court thought that they were bound by the finding that the hiring was a weekly one, and in *Walsh* v. *Walley* (2) the wages, whether earned or not, might be forfeited by the workman who was not protected by the Act.

BRETT, L.J. I am of opinion that the facts shewing the agreement are set out in the earlier part of the case, and that the statement in paragraph 14 is a finding by the justices that in their view of those facts the hiring was a weekly one. If the hiring was a weekly hiring for weekly wages, then as no wages would be due until the end of the week, if the appellant left before the end of the week, I am clearly of opinion that this would not be within the 11th section of the Employers and

(1) 34 L. T. (N.S.) 143. (2) Law Rep. 9 Q. B. 367.

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Workmen Act, 1875, but would be a case in which the appellant was claiming for a sum which was never due at all. But taking the facts to be as they are set out in this case, I think that they do not justify the opinion of the justices that there was here a weekly hiring for weekly wages. I think that the contract was that the appellant should work weekly, and that as soon as she had finished a piece she would have earned the price she was to be paid for it, but that though she would have earned such price it would not be due in the sense of being payable until the subsequent Saturday, and not then, except in respect of work which had been done and booked up at 3 o'clock of the preceding Wednesday, as work done after that time would be paid for only on the second Saturday. In the present case, according to my opinion, the price for the work which the appellant had done and had booked on the Wednesday was then earned and due, but was not then payable. A collateral part of the contract of service was that the appellant should work from week to week until a fortnight's previous notice was given by her on a Saturday, and there was also a corresponding engagement by the master to give a similar notice except in certain cases. Therefore there was a weekly hiring in this sense that there was a contract to work from week to week, namely, from Saturday to Saturday, which was only to be put an end to by giving fourteen days' previous notice. There was, however, no contract for a weekly hiring at weekly wages. Suppose the operative, instead of being a woman had been a workman, and that the same circumstances had happened as had occurred in this case, and that in like manner he had left without notice, then the rules being part of the contract, although he would have earned the price to be paid for his work it would have been forfeited by rules 15 and 16. So in this case, coming to the conclusion I do upon all the facts set out in it, the view the master took of them at the time is important as shewing that he considered that the appellant had earned what she claimed, but that it was forfeited by rules 15 and 16, and so it would have been, but for the 11th section of the Employers and Workmen Act, 1875. Now that enactment deals with forfeiture but limits it when it is applied to the case of a child, young person, or woman, subject to the Factory Acts.

It does not do away with forfeiture wholly, because if any damage be sustained by the employer the amount may be deducted from the sum due, and it would require therefore that there should be a forfeiture to deduct such amount at all. The statute allows the employer to deduct up to the amount of such damage, but it protects children and women from any such violent rule as is to be found amongst the rules at the mill in the present case, which though binding on men, who are supposed to be able to take care of themselves, the legislature has said if applied to women and children, shall not, except where damage has been done, deprive them of what may be due to them for wages. Here there has been no such damage, and therefore no forfeiture shall be deducted, because the forfeiture in this case is set aside by the Act of Parliament. In thus deciding, I wish it to be understood that we do not decide anything which is contrary to the cases of *Saunders* v. *Whittle* (1) and *Gregson* v. *Watson* (2), as in those cases there was a distinct finding of a weekly hiring, which was a finding of the facts and not an inference of law which it is here, and which in my opinion is a wrong one.

COTTON, L.J. In the Queen's Bench Division it seems to have been assumed that the case was concluded by that of *Gregson* v. *Watson*. (2) If the facts were the same as in that case, I should have been prepared to have affirmed the decision, but they are not. In my opinion the 11th section of the Employers and Workmen Act, 1875, was not intended to give any right to wages which a person would not have had at the common law, but simply to enact that such right should not in certain cases be subject to forfeiture. Where therefore under the contract of service no wages have become due the section would not apply, as there would then be no forfeiture of anything due. Now the only difficulty in the present case, is whether what is stated in paragraph 14 binds us as a finding that the hiring was a weekly one. My opinion is that what is there stated is not a finding of a fact but a conclusion of law, and the conclusion come to that the hiring is a weekly one is inconsistent with rule 15, which requires the notice to be given on a Saturday. It appears to my mind

(1) 33 L. T. (N.S.) 816. (2) 34 L. T. (N.S.) 143.

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from the facts stated that this was not a weekly hiring, and that that which was due to the appellant in respect of work done by her was ascertained every Wednesday, but was not payable until the following Saturday. The appellant was, I think, entitled in the present case to be paid for the work she had done, and the 11th section of the Act applied.

Appeal allowed.

Solicitors for appellant: *Shaw & Tremellen.*
Solicitors for respondent: *Doyle & Sons.*

Nov. 10.

Q. B. D.

MOGG, APPELLANT; THE OVERSEERS OF YATTON, RESPONDENTS.

Poor Rate—Occupation—Sale of Grass on Land—Right of Grazing.

The appellant was the owner of certain land, and such land being unlet, he sold the grass upon it by auction. The conditions of sale described the sale as a sale of grass for a certain time, and set forth certain conditions under which the purchasers were to be entitled to turn cattle in to eat the grass. The conditions also provided that the purchasers should dress the dung, cut the thistles, and leave the fences in good repair. It was a term of the sale that the vendor should pay the rates and taxes.

The appellant was rated to the poor rate in respect of the land in question for a period coincident with part of the period for which the grass was sold. An application having been made to the justices to enforce the rate against him:—

Held, that there was evidence that the appellant was the occupier of the land; that the effect of the sale of the grass was not to put the purchasers in occupation of the land, but merely to license them to graze their cattle thereon; and that, consequently, the appellant was liable to be rated.

CASE stated by justices under 20 & 21 Vict. c. 43.

The facts were in substance as follows:—The respondents had applied to the justices for an order upon the appellant to pay a proportionate part of a poor rate. It was proved at the hearing that the appellant was the owner of about eighty acres of grass land in the parish of Yatton, in the county of Somerset. On the 25th of March, 1879, the previously existing tenancy of the land determined, and the appellant was unable to procure a fresh tenant. On the 28th of March the rate in question was made for the parish of Yatton, the occupier's column being, so far as the appellant's land was concerned, left blank

therein. The land remaining unlet, the appellant instructed an auctioneer to sell the grass on the land by auction. The advertisements of the sale described it as being of "About eighty acres of grass in lots to the 21st day of December next." The conditions of sale were headed "Conditions of Sale of Grass." The second condition was, "Each lot of grass will be sold from the day of sale to the 21st day of March, 1880, to be fed with any kind of stock up to the 21st of December, 1879 (horses only up to the 29th of September, 1879) and sheep only from the 21st of December to the 21st of March, 1880. Purchasers to dress the dung, cut the thistles, and leave the fences in good repair." The sale took place on the 7th of May, 1879, when the grass was sold in several lots to eight different purchasers. It was proved by the auctioneer that it was the custom in that district, in selling grass, that the vendor should pay all rates and taxes, and that the sale in this case was made free of all rates, tithes, and taxes, and was stated to be so at the auction.

After the sale became known to the respondents, acting under 32 & 33 Vict. c. 41, s. 16, they inserted the appellant's name in the rate in respect of the said land. The appellant contended that he was not the occupier of the land, but that the purchasers of the grass were in exclusive occupation of the land and might maintain trespass against him, and consequently that they were liable to be rated, and not the appellant. No evidence was given to shew that the appellant had ever depastured cattle on or personally occupied the land in question. The justices, however, were of opinion that the appellant, from the time of the sale of the grass by auction, was in beneficial occupation of the land through the purchasers, and ordered him to pay the proportionate part of the rate from the 7th of May.

The question for the Court was, whether the appellant was liable to be rated.

Anstie, for the appellant. The appellant was not liable to be rated. The purchasers of the grass were in occupation of the surface. All the authorities shew that a grant of "vestura terræ" is a grant of the exclusive possession of the surface. But in this case there is more than that; there are express provisions that the

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purchasers of the grass were to do acts such as cutting thistles and repairing fences which are only consistent with possession of the land. Practically all that could be done or enjoyed by way of enjoyment of the surface was to be done and enjoyed by the purchasers of the grass. [He cited *Allen* v. *Overseers of Liverpool* (1); *Cory* v. *Bristow* (2); *Wilson* v. *Mackreth* (3); *Burt* v. *Moore* (4); *Cox* v. *Glue.* (5)]

Castle, for the respondents. The appellant was in occupation of the land, and therefore liable to be rated. The question is really one of fact, viz., whether the transaction amounted to a letting of the land, or a mere sale of the grass with a licence to the purchasers to take it by their cattle within a certain time. It is contended that the terms of the sale clearly point to the latter conclusion. [He cited *Smith* v. *Overseers of St. Michael, Cambridge* (6); *Rex* v. *Mayor of London* (7); *Queen* v. *St. Pancras* (8); *Rex* v. *Mayor of York.* (9)]

Anstie, in reply, cited *Jones* v. *Flint* (10); *Crosby* v. *Wadsworth.* (11)

MANISTY, J. I am of opinion that our judgment must be for the respondents. The question really comes to this. What was the true nature of the transaction of the 7th of May? Was it a demise or sale of the occupation of the surface of the land, or a mere sale of the grass growing on the land? The advertisement and conditions of sale treat it as the latter, and the stipulation that the rates should be paid by the owner of the land is very important, as shewing the intention of the parties to be that there should not be a demise or sale of the exclusive possession of the surface of the land, but a sale of the mere right, by way of licence, to turn beasts on to eat the herbage for a certain time.

It appears to me that the facts are quite consistent with the view that the intention of the parties and the nature of the trans-

(1) Law Rep. 9 Q. B. 180.
(2) Law Rep. 10 C. P. 504; 2 App. Cas. 262.
(3) 3 Burr. 1824.
(4) 5 T. R. 329.
(5) 5 C. B. 533.
(6) 3 E. & E. 383; 30 L. J. (M.C.) 74.
(7) 4 T. R. 21.
(8) 2 Q. B. D. 581.
(9) 6 A. & E. 419.
(10) 10 A. & E. 753.
(11) 6 East, 602.

action was that the owner of the land was to be rated, and to be the occupier subject to the right of the purchasers to depasture their cattle on the land for a certain time. If there was evidence for the justices of occupation by the appellant, and it appears to me that there was, the question was one of fact of which they are the judges. I do not propose to go through the cases that have been cited. The decisions on the 4th section of the Statute of Frauds that have been cited for the appellant are no doubt to some extent in pari materiâ, but I do not think there is any decision which precludes us from looking at the substance of the transaction, as it appears from all the circumstances of the case, in order to see who was the occupier of the land, and accordingly liable to be rated.

BOWEN, J., concurred.

Order affirmed.

Solicitors for appellant: *Crowder, Anstie, & Vizard.*
Solicitors for respondents: *Guscotte, Wadham, & Daw.*

EYTON, APPELLANT; THE OVERSEERS OF MOLD, RESPONDENTS.

Nov. 13.

Q. B. D.

Poor Rate—Sporting Rights—Woodland—Game—Rating Act, 1874 (37 & 38 *Vict. c.* 54), *s.* 4, *sub-s.* (*a*).

The appellant was the owner and occupier of certain woodlands in respect of which he was rated to the poor rate. He used the lands in question as plantations and woods and exercised the right of sporting over them. In the case of each piece of land a certain amount per acre was added to the rateable value of the land in respect of such right of sporting:—

Held, that the right of sporting was properly taken into account in estimating the rateable value of the land in its natural and unimproved state.

CASE stated upon appeal against a poor rate, under 12 & 13 Vict. c. 45, s. 11.

The facts stated were as follows:

The appellant was the owner and occupier of certain woodlands which were assessed to the poor rate. The lands were used by the appellant as plantations or woods, and he enjoyed and exercised the right of sporting over them. The gross estimated

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rental and rateable value of the lands as assessed in the rate included a sum of 2*s.* per acre, which was added in the case of each piece of land to the natural and unimproved value of the woodland in respect of the right of sporting.

The question for the Court was whether the sums so added in respect of such right of sporting were rightly included in the assessment.

Marshall (*Bankes*, with him), for the appellant. It is contended that this case comes within the 4th section of the Rating Act, 1874, sub-sect. (a). That sub-section provides that "if the land is used only for a plantation or a wood the value shall be estimated as if the land instead of being a plantation or a wood were let and occupied in its natural and unimproved state." The word "only" in the sub-section is in opposition to the cases referred to in the other sub-sections, viz., where the land is used for the growth of saleable underwoods and where it is used partly for a plantation or a wood and partly for the growth of saleable underwoods. It is not meant to exclude the case of woods used as a covert for game. Any wood therefore not used wholly or partly for the growth of saleable underwood is within the sub-section, and consequently must be rated as if let and occupied in its natural and unimproved state. That is, it must be rated as waste or common land uncovered by trees, and the game, for which the trees act as a covert, must not be taken into account.

[He cited *Hilton* v. *Bowes* (1); *Reg.* v. *Williams* (2); *Reg.* v. *Battle Union.* (3)]

Darling, for the respondents. The Rating Act, 1874, was passed to bring within the rates two sorts of property which before escaped, viz., growing timber and rights of sporting when severed from the occupation of the soil. The game would have formed part of the rateable value in this case before the Act. The legislature meant in such a case as this to rate the wood, but they never meant to exempt the game.

[He was proceeding to discuss the language of the Act, when he was stopped by the Court.]

(1) Law Rep. 1 Q. B. 359. (2) 23 L. T. (O.S.) 76.
(3) Law Rep. 2 Q. B. 8.

FIELD, J. I am clearly of opinion that our judgment should be for the respondents. The subject of the rate is land upon which trees are growing. We are not told by the case that the land is in any other than its natural state. All we are told is that it is woodland, and the occupier exercises the right of sporting over it. Before the passing of the Rating Act, 1874, the state of the law with reference to the rating of land with game upon it was well settled. It was settled law—and it does not appear to me that the legislature proposed by the Rating Act, 1874, to interfere with that state of the law—that, if the occupier of the land had not severed the right of taking game, the land was to be assessed at the amount for which it would let to a yearly tenant, its value being enhanced by its capacity for sporting purposes. But, if the right of sporting were severed from the occupation of the land, it could not be rated in the hands of the licensee for the reason not that it had no value but that it was not rateable, being an incorporeal hereditament. It was also the law that land used merely as woodland was not rateable. The Statute of Elizabeth expressly mentioning saleable underwoods, it was held that growing timber was excluded; and, secondly, independently of the statute, there was a difficulty in the nature of things in rating growing timber, because the rate is made for short periods, and to rate a man in respect of timber which might not be fit to cut till his grandson's time might fairly be thought inequitable. Saleable underwoods were in a different position, because they were cut from time to time and produced a profit at short intervals. Such being the law the legislature came to the conclusion that land used for growing timber ought not to be entirely exempt. Accordingly they provided by the Rating Act, 1874, s. 3, that the Poor Rate Acts should extend to land used for a plantation or wood. This land is so used, therefore clearly it ought to be rated. Then the question arises on what footing it is to be assessed. Primâ facie and so far as not expressly provided otherwise, it must be rated as other land with all its advantages according to the principle laid down in *Reg.* v. *Williams.* (1) If it is land with trees on it forming good cover for game, primâ facie the existence of the game would form an element of its value for the purposes

(1) 23 L. T. (O.S.) 76.

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of assessment. The counsel for the appellant relies on the 4th section as shewing that the natural ordinary principle of rating is not to be applied, and that, although if the right of sporting were severed from the occupation of the land it must admittedly be rated under the Act, yet if the occupier retains such right it must not be rated. This seems unreasonable, but if the words compel us to come to this conclusion we must do so. But do the words compel us to come to this very strong conclusion? Sub-section (a) is the one relied upon. That sub-section provides, "If the land is used only for a plantation or a wood the value shall be estimated as if the land, instead of being a plantation or a wood, were let and occupied in its natural and unimproved state." The appellant's counsel contended that the word "only" did not exclude the case of a woodland used for sporting purposes, but it does not seem necessary to express any opinion as to this. For, when we look at the concluding words of the sub-section, we see that the land, assuming it to be within the sub-section, is to be treated as being in its natural and unimproved state. I do not see how the existence of game is inconsistent with the natural state of the land, seeing that the country in the original state of nature would be probably more or less covered with game. Land in its natural state may or may not be enhanced in value by game, but in this case it appears that there is game upon the land, and I think we must take it upon the case as stated that the land in its natural state would have game upon it. That being so, it appears to me that the value of the sporting right was properly taken into account in estimating the rateable value. Upon these grounds I think we must answer the question submitted to us in favour of the respondents.

MANISTY, J. I am clearly of the same opinion. The 4th section makes plantations or woods rateable in different ways according to the circumstances. It does not appear to me that the word "only" in subs-s. (a) means to exclude the sporting rights. The sub-section is only speaking of the timber as distinguished from saleable underwoods. With regard to that the land is to be rated as if let and occupied in its natural and unimproved state. The plantations and woods on it are not to be taken into account, but

if the land in its natural and unimproved state may have an enhanced value from the presence of game, such enhanced value may be taken into account in the assessment of it.

Judgment for the respondents.

Solicitors for appellant: *Simpson, Hammond, & Co., for Kelly & Keene.*

Solicitors for respondents: *Same as for appellants.*

ROUCH, APPELLANT; HALL, RESPONDENT.

Nov. 13.

Q. B. D.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 13, 14—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 3—*Sample of Milk procured for Analysis—Portion of Sample not delivered to Seller or his Agent.*

It is not necessary, where a sample of milk in course of delivery is procured for analysis under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, for the officer procuring such sample to notify to the seller or his agent his intention of having the sample analysed, or to deliver to the seller or his agent a portion of the sample in accordance with the provisions of s. 14 of the Sale of Food and Drugs Act, 1875.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43. The facts were in substance as follows:—

The respondent, a farmer living near Coventry, had been summoned by the appellant, an inspector of nuisances, under the Sale of Food and Drugs Act, 1875, for selling milk adulterated with water.

It appeared that the respondent had contracted to supply milk to a milk dealer in London, and to deliver such milk at Euston station. The appellant, being at Euston station while certain milk which had been sent in pursuance of this contract was in the course of being unloaded from the train by a railway porter, had required the porter to give him a sample of the milk. Upon the porter doing so he told him that he intended to have the milk analysed, and, having divided the sample into three parts, handed one of them to the porter.

The magistrate dismissed the summons, on the ground that the provisions of the 14th section of the Sale of Food and Drugs Act,

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1875, had not been complied with, the porter not being the agent of the seller of the milk within the meaning of that section. The question for the Court was whether his decision was right. (1)

Tickell, for the appellant. The 14th section of the Sale of Food and Drugs Act, 1875, is not to be read with the 3rd section of the amending Act. The provision of the latter section is that the sample procured in accordance therewith is to be analysed, as in the case of a sample purchased under s. 13 of the principal Act, but there is no incorporation of the provisions of s. 14. The intention was that a sample might be taken of milk in the course of delivery, but it would be impossible to carry out in such a case the provisions of s. 14. The seller might live at a distance, and it might be impracticable to discover who he was.

(1) The Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 3, enacts as follows:—

Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, &c., may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk, and such officer, inspector, or constable, if he suspects the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analysed, and the same shall be analysed, and proceedings shall be taken, and penalties on conviction be enforced in like manner in all respects as if such officer, inspector, or constable had purchased the same from the seller or consignor under s. 13 of the principal Act.

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), provides as follows:—

Sect. 13. Any medical officer of health, inspector of nuisances, &c., may procure any sample of food or drugs, and, if he suspect the same to have been sold to him contrary to any provisions of this Act, shall submit the same to be analysed by the analyst of the district or place for which he acts . . . and such analyst shall, on receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer wherein he shall specify the result of the analysis.

Sect. 14. The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison, and submit the third part, if he deems it right to have the article analysed, to the analyst.

[He admitted that the porter could not be regarded as the agent of the seller for the purposes of s. 14.]

No one appeared for the respondent.

FIELD, J. I think that this appeal must be allowed, and that the appellant was not bound to take the steps required by s. 14 of the principal Act. I am clearly of opinion, if he were, that the railway porter was not the seller's agent for this purpose. In order to decide this question, we have to see whether the 14th section of the principal Act applies to cases where a sample is procured under s. 3 of the amending Act. By the original Act public analysts are to be appointed by certain specified public authorities, therefore presumably they will be persons above suspicion. Inspectors and other public officers similarly appointed are to carry out the provisions of the Act, the object of which is to secure for the consumer pure and unadulterated articles. Certain provisions are by s. 14 enacted as safeguards to the seller, from whom a sample may be purchased for analysis. A portion of the sample is to be offered to the seller or his agent, in order that if the seller thinks fit he may procure an independent analysis. If, however, the seller does not think fit to receive the portion of the sample so offered to him, the sample is (by s. 15) to be divided into two parts only, one of which is to be retained for production on any subsequent proceedings, and the other is to be analysed. Such being the provisions of the original Act, in construing the provisions of the amending Act, it is necessary to consider what took place in cases of this sort before the amending Act was passed. The retail dealer, on whose premises the milk was found, in many cases urged that he had made a contract with the farmer in the country for the supply of pure milk, that he delivered it as he received it, and that it was impossible for him before delivery of the milk to his customers to analyse it. The legislature appear, in order to meet this difficulty, to have determined to provide against the possibility of adulteration of milk in the country. They therefore provide in s. 3 of the amending Act for the taking of samples of milk while in the course of delivery. It would often be impossible in the cases provided for by this section to comply with the provisions of s. 14 of the original

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Act. The seller of the milk may live far away, as in the present case. It may be impossible to discover who he is without considerable delay, and so impossible "forthwith" to deliver him a portion of the sample. If the language used clearly necessitates the incorporation of the provisions of s. 14, of course we must so construe the section. But when words are ambiguous, it is a strong argument against a proposed construction of them that it will lead to an absurdity, and tend to defect the object of the provision. It seems to me that to read the provisions of s. 14, into s. 3 of the amending Act, and to treat those provisions as conditions precedent to a conviction, would in cases like the present defeat the intention of the legislature. Although this may be the result, if the language is clear, we should not be justified in reading the Act otherwise than according to the words, but, on considering the language employed, I do not think we are compelled to arrive at the conclusion that the legislature intended to require a mode of procedure which from the nature of the case would be cumbrous and absurd. The section provides that the sample procured under s. 3 shall be analysed, and proceedings shall be taken in the same manner as in the case of a sample purchased under s. 13 of the principal Act. It does not say that the sample shall before the analysis be divided into portions as required by the 14th section. It seems to me to be quite consistent with this language and the object of the Act, to hold that the legislature, having regard to the practical exigencies of the case, and the urgent need for the prevention of a great public mischief, did not intend the seller of the milk to have a portion of the sample handed to him, inasmuch as so great a difficulty might arise under the circumstances in carrying out such a mode of procedure, and that in this particular case they relied on the fact that the sample would be taken, and the analysis carried out by public officials, as being sufficient protection for the consignor of the milk, without his having the particular advantage given to the seller under the 14th section of the original Act. For these reasons, I think our judgment must be for the appellant.

MANISTY, J. I am of the same opinion. The 3rd section

contains no express reference to the 14th section of the principal Act, and it does not seem to me that the language of the section is such as would have been employed if it had been intended to incorporate the provisions of that section.

Case remitted to magistrate.

Solicitor for appellant: *Ricketts.*

ROBINSON *v.* CURREY.

Nov. 17.

Q. B. D.

Penalties, Action for — Limitation of Time — Selling Silver Wares with Counterfeit Mark—"Party grieved"—7 & 8 Vict. c. 22, s. 3—3 & 4 Wm. 4, c. 42, s. 3.

An action by an officer of one of the companies of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that Act, is an action by a "party grieved" within 3 & 4 Wm. 4, c. 42, s. 3, and consequently cannot be brought more than two years after the cause of action accrued.

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STATEMENT OF CLAIM was in substance as follows:—

The plaintiff was an officer, that is to say, deputy warden of the company of Goldsmiths in London, and sued as such officer for and on behalf of the company of Goldsmiths by virtue of 7 & 8 Vict. c. 22.

The defendant was a dealer in silver wares carrying on business in Clerkenwell.

The defendant, at divers times in the year 1872, sold to one Charles Johnstone Hill divers wares of silver, described in the statement of claim, amounting in the whole to 643 wares of silver.

At the several times when the said wares of silver were so sold by the defendant, each of the said wares had thereupon, against the form of the said statute, a counterfeit imitation of the mark of an instrument theretofore used by the said company of Goldsmiths in London for marking silver wares. By reason of the premises, and by virtue of the said statute, the defendant forfeited and became liable to pay for every ware so sold by him the sum of 10*l.*, amounting in the whole to the sum of 6430*l.*

The plaintiff, as such officer of the said company of Goldsmiths in London, for and on behalf of the said company, claimed 6430*l.*

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The 4th paragraph of the statement of defence averred that the alleged cause of action did not accrue within two years before action brought.

Demurrer.

Nov. 12. *Wills, Q.C.* (*Coxon,* with him), for the plaintiff. The short question seems to be whether the Goldsmiths' Company in London can recover penalties under 7 & 8 Vict. c. 22, s. 3, as "parties grieved," within the meaning of 3 & 4 Wm. 4, c. 42. It is contended that it would be an abuse of language to call them parties grieved. They have no private or particular grievance. They are a body with certain public functions to perform to which their funds are applicable, and they exist for the protection of the public from frauds. The penalties given by the 3rd section of 7 & 8 Vict. c. 22, under which this action is brought, do not go to them in any private or individual capacity, but are applicable by the 10th section to certain public purposes, viz., the expenses of the company's assay office, and of prosecuting offenders under the Act. That there is no individual grievance peculiar to the company suing is shewn by the fact that, by the 3rd section, any of the Goldsmiths' Companies enumerated in the Act may sue, irrespective of the question whether it is the mark of the company suing or that of any other company that has been counterfeited. There is no reason for applying the two years' limitation to such a case. It is often impossible to detect these frauds in two years, and being public bodies these companies may be trusted not to proceed vexatiously.

Sir J. Holker, Q.C. (*Crump,* with him), for the defendant. The section ought not to be construed as meaning that any of the companies may recover the penalties. It must surely mean that the company whose mark is counterfeited is the one that may sue. The words of s. 10, which provides how the penalty is to be recovered are "in the name of any officer of the said several companies respectively."

[FIELD, J. May it not be intended as a premium on the diligence of the particular company in detecting offenders that it should have the penalty for selling goods with the counterfeit mark of any of the companies upon them?]

It is submitted that it cannot have been intended that the London company should sue in respect of the counterfeiting of the Birmingham company's mark. Each company has a special interest in its particular mark. They are the guardians of the mark in their particular district, and the penalty is for their protection in this respect. If their mark is counterfeited, they may be supposed to have stamped base metal with it. Even if the true construction be that any company may recover the penalty, then it only comes to this, that the companies each have an interest in the protection of the marks of all. It is enough to constitute them parties grieved that any interest of theirs, even in their public capacity, may be jeopardized.

Secondly, if 3 & 4 Wm. 4, c. 42, s. 3, does not apply, it is contended that all penal actions have some period of limitation, and if this is not an action by a party grieved, it must be regarded as an action by a common informer, and so within 31 Eliz. c. 5. In the case of *Dyer* v. *Best* (1), it was held that the statute of Elizabeth applied to all penal actions. In that case the period of limitation is one year. [He also cited on this point *Culliford* v. *Blandford* (2); *Lookup* v. *Frederick* (3); *Barrett* v. *Johnson*. (4)]

Wills, Q.C., in reply. These companies have no exclusive territorial area of jurisdiction. A man making goods in London may send them to be stamped in Leicester. This is clearly not an action by a common informer. A common informer is one who only sues as one of the public, the action being given to the first person who will sue. The case of *Dyer* v. *Best* (1) is therefore distinguishable. The decision in that case was that an action by a common informer was within the statute 31 Eliz., and the reason given was that the statute could hardly have meant to relieve the common informer from all limitation, seeing that the common informer was included in the stat. 7 Hen. 8, c. 3. Though the judgment does use language that imports that the statute of Elizabeth applies to all penal actions, this was quite unnecessary for the decision. This is a special class of penal actions not contemplated in the decision in *Dyer* v. *Best* (1), viz., where the action is given to a specified public body in the interests of the public,

(1) Law Rep. 1 Ex. 152.
(2) 1 Carth. 232.
(3) 4 Burr. 2018.
(4) 2 Jones (Ir. Ex.) 197.

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not to the Crown or a qui tam informer or a common informer. Assuming that it is desirable that there should be a limitation to this class of actions, the Court will not strain the words of the legislature to cover what is really a casus omissus. If *Dyer* v. *Best* (1) covers this case it conflicts with *Culliford* v. *Blandford* (2), which was decided long previously by Lord Holt, and consequently the question is an open one. It was decided in the case of the *Guardians of St. Leonard's, Shoreditch* v. *Franklin* (3) that a corporation cannot be a common informer. The decisions as to the meaning of "party grieved," with reference to the statutes that give an appeal to quarter sessions, may be found collected in Leeming & Cross's Practice of Quarter Sessions, 2nd ed. 217.

Cur. adv. vult.

Nov. 17. The following judgments were delivered:

FIELD, J. This is an action brought by the plaintiff as the representative of the Goldsmiths' Company, and therefore by a party other than a common informer, to recover certain penalties for offences alleged to have been committed against the statute 7 & 8 Vict. c. 22. The defendant founds his defence upon (amongst other matters) the Statute of Limitations, 3 & 4 Wm. 4, c. 42, s. 3, which enacts that in the case of actions for penalties by a party grieved the period of limitation shall be two years. To that part of the defence the plaintiff has demurred. There is no demurrer to the statement of claim, nor upon the argument of the demurrer was any objection made to the statement of claim. We therefore take it that, according to the true construction of the statute sued upon, the plaintiff has a good cause of action as set forth in the statement of claim. The nominal plaintiff is an individual, but inasmuch as he merely sues as the agent of the Goldsmiths' Company they are substantially the plaintiffs. It was contended at the bar on behalf of the defendant that, independently of the two years' period of limitation expressly referred to in the defence, a still narrower limit applied, and that a year was the period of limitation applicable if

(1) Law Rep. 1 Ex. 152. (2) 1 Carth. 232.
(3) 3 C. P. D. 377.

the two years' period did not apply. The contention was twofold: first, that the plaintiff was a party grieved, and so 3 & 4 Wm. 4, c. 42, s. 3, applied; and, secondly, if not, that the statute 31 Eliz. c. 5, s. 6, applied and so, quâcunque viâ datâ, the defence was good. We have come to the conclusion that the plaintiff is a party grieved within the meaning of 3 & 4 Wm. 4, c. 42, and consequently that the defence relied upon is a bar to the action. The question turns on the true construction of the statutes 7 & 8 Vict. c. 22, and 3 & 4 Wm. 4, c. 42. In the course of the argument I asked for a reference to the decisions as to the meaning of "party grieved" in the various statutes relating to appeals to quarter sessions. On consideration I do not think those cases afford much guidance on the present point. It is very intelligible that, in order to have a right of appeal, a person must shew some grievance other than that of the public at large, but the case is not analogous to that of a penalty given to a party grieved, and therefore I dismiss those cases from further consideration, and consider this case with reference to the language of the statutes before referred to, viz. 3 & 4 Wm. 4, c. 42, and 7 & 8 Vict. c. 22. The question is whether the provisions of the latter statute constitute the plaintiff a party grieved within the meaning of the former. We must consider, therefore, who the party is to whom this action is given by the statute, and how that party, if a party grieved, comes to be so.

It appears that in early days, when every trade had its own guild, the workers in gold and silver in London were incorporated under the style of the master and wardens of the Goldsmiths' Company of London, and a like body also came into existence in Edinburgh. The origin of some of the other companies is a little obscure, but various such bodies appear from time to time to have come into existence in other places.

It appears also that these companies had previously to the time of Henry VI. exercised the functions of assayers of gold and silver wares, and that the workers in gold and silver in the various places had been in the habit of bringing their wares to them to be touched, as it was called, with the die of the particular company. Up to the time of Henry VI. there does not appear to have been any statutory recognition of their practice in this

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respect, but in that reign to secure the genuineness of plate, which was an article liable to be counterfeited, it seems to have been enacted that no one should sell silver plate without its being so touched. A series of statutes intervened between that time and the statute which we have to construe, but it is not necessary to allude to any of them, except in one instance to which I shall hereafter advert. The first two sections of 7 & 8 Vict. c. 22, enact or re-enact certain felonies in the nature of forging a die or uttering the same. Then comes the 3rd section, which creates the penalties now sued for. That section imposes a penalty of 10*l.* on any dealer in gold or silver wares selling or having in his possession any wares with forgeries of the marks of any of these companies upon them, and provides that the penalty "may be sued for and recovered by any of the several companies of goldsmiths and guardians aforesaid, in manner hereinafter provided."

Now, stopping in the perusal of the section at the words, "shall forfeit and pay 10*l.*" which precede the concluding words expressly giving the penalty to the Goldsmiths' Companies; in the absence of any of the provisions usual in the majority of such statutes, giving the penalty to the Crown and the informer, or the informer and the poor of the parish, or the common informer alone, to whom would it be reasonable to expect that the penalties in respect of wares bearing a counterfeit of the mark of one of the Goldsmiths' Companies should be payable? It may be noticed that 12 Geo. 2, c. 26, s. 22, a previous Act on the same subject, gave the penalties under that Act partly to the Crown and partly to the person who should sue for the same. That Act being repealed and there being no provision of that sort in the present Act, to whom would it be natural and reasonable to suppose that the penalty was intended to be paid? There might be some difficulty in saying that it should be paid to the party grieved without express provision to that effect. It seems, however, reasonable to suppose that the intention would be that it should go to all or some or one of the Goldsmiths' Companies whose marks were intended to be prevented from being counterfeited. Accordingly on reading on, we find it so provided by the concluding words of the section. With regard to those words it was urged by the counsel for the plaintiff, and I think correctly, that any of the

companies mentioned in the Act could have sued for these penalties. For instance, that the Birmingham Company of Goldsmiths could have sued although the marks forged were those of the London Company.

It is to be observed that none of these companies seem to have any specific local area of jurisdiction. A goldsmith in one place would, it appears, be entitled to send his wares to be marked by the company of any other place. This tends to shew that the meaning of the concluding part of the section is that any of the companies may sue. This view is further strengthened by the provisions of the 8th section. Under that section it appears that where any dealer in gold or silver wares, who has entered his private mark with any of the companies and given the particulars of his place of business in conformity with the section, shall change his place of business, he must enter the particulars of his new place of business, wherever it may be, with the company with which he had left the particulars of his previous place of business. The penalty given by that section for non-compliance with its provisions is to be sued for "by the company of goldsmiths or guardians aforesaid in respect whereof such default shall have been made." That shews that the legislature, where they meant that any particular company should sue, used express words to that effect, and that, by the general language used in the 3rd section, they must have meant that any of the companies should be entitled to recover. With regard to the application of the penalties when recovered we must look to the 10th section, which provides that "every such penalty which shall be sued for and recovered in the name of any officer of the said several companies respectively shall go and be paid wholly to the company to which such officer shall belong, to be applied by such company in defraying the expenses of their assay office, and of detecting and prosecuting offenders against this Act." The penalty, therefore, is recoverable by any one of the companies, and when recovered it is applicable to the purposes of that company only. The result, then, of the whole is this. The offence is in respect of the forgery of the mark of one of these companies irrespective of any property of the company suing in the mark, and the penalty is recoverable by any one of the companies mentioned who may sue, and when recovered it

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is applicable to the purposes of that company only. It seems to me clear that the statute having given the plaintiffs, the company of Goldsmiths of London, the right of action to recover the penalty (an action of debt it would have been called in olden days), and having provided that when recovered it shall be applicable to their purposes, that constitutes the company a party grieved within the meaning of 3 & 4 Wm. 4, c. 42, s. 3. I think that authority for this view may be found in Buller's Nisi Prius, p. 197, and the case of *Shinler* v. *Roberts*, there cited.

Leaving the language of the statute and looking for a while to the reason of the thing, I quite agree that it is not for us to supply the omissions of the legislature, yet it would be too rigid a mode of construction to say that we must not look at the general scope of the legislation on the subject for the purpose of construing the language of a particular enactment, and therefore it is useful to consider the general state of the law of limitation with regard to these actions. The laws of limitation came into existence generally in the times of Henry VIII., Elizabeth, and James I. Then there was a long period during which the subject of limitations was not dealt with by the legislature. The Statute of Elizabeth struck only at the common informer, whether suing for himself or himself and the Crown. So, until 3 & 4 Wm. 4, c. 42, there was no limitation as to actions by the party grieved, and so far as my knowledge extends the practice of giving the penalty to the party grieved seems in general to have been subsequent to the earlier statutes of limitation on this subject. Is it reasonable to suppose that the legislature, when passing a general Act with respect to the limitation of actions for penalties by parties grieved, should have omitted so large a class of actions as this? It seems to me very unreasonable. I think, therefore, that we are acting upon the intention of the legislature, as well as the language of the Acts, in holding that, unless the plaintiff can shew a cause of action within the period of two years, the defendant is entitled to succeed.

MANISTY, J. I am of the same opinion. It seems to me that the policy of the law both with regard to this class of actions and all other penal actions is, that there should be a limit to the time

within which they can be brought. Therefore if it were held that this action was not within 3 & 4 Wm. 4, c. 42, and it were necessary to decide the point whether it came within the statute 31 Eliz. c. 5, I should hesitate long before I decided in the negative. The intention of the legislature, as it may be gathered from that statute, appears to have been that with regard to actions for penalties, except those at the suit of the Crown, for which a somewhat longer period was allowed, there should be a limit and a very short limit.

The case of *Dyer* v. *Best* (1) is a very strong authority, even if it does not go the whole length of this case, to shew that if the plaintiff here was not a party grieved within 3 & 4 Wm. 4, c. 42, he must be within the statute 31 Eliz. c. 5, and this action must have been brought within one year. The legislature, in dealing with actions for penalties by parties grieved, extended the time beyond that allowed in the case of penal actions generally, by giving two years instead of one. And it seems reasonable that the time should be so extended, but it would be very extraordinary that, in the case of actions of this class with which we are now dealing, there should be a total omission to provide any limit at at all. It is not necessary I think to decide the question whether this action would come within the Statute of Elizabeth, because we are of opinion that the Goldsmiths' Company were parties grieved.

The 7 & 8 Vict. c. 22, is one of a series of statutes passed from time to time to prevent frauds with regard to gold and silver wares. The object was that certain bodies enumerated should have power to prevent abuses in the making and counterfeiting of gold and silver wares. They are to have the power of assaying, testing, and marking such wares.

Whether or no these bodies can be said to get directly any profit from the exercise of their functions may be questioned, but indirectly they have an interest, and a most substantial interest, in preventing the counterfeiting of their marks, and preserving the purity of gold and silver wares. By the 3rd section they are given the penalties for the sale of wares with a counterfeit mark, and for each such ware so sold they may recover a penalty of 10*l*.

(1) Law Rep. 1 Ex. 152.

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It seems to me to be clear that these provisions constitute the company suing parties grieved within the meaning of 3 & 4 Wm. 4, c. 42. Common informers they certainly are not. They do not sue as one of the public. They are a number of corporations having certain specified rights which are protected by these penalties. If they are not parties grieved I do not know under what classification they could come. The decisions as to the meaning of "party grieved," are very few. In the case of *Boyce* v. *Higgins* (1) Maule, J., seems to have thought that the test was whether there was any particular grief beyond that which may be suffered by any member of the public.

The only other question I wish to refer to is whether this penalty is given to any of the various companies. It does not seem necessary to decide it, but if it were, I am inclined to agree with my Brother Field that any of these companies might sue. The language of the 10th section, which says that every such penalty which shall be recovered in the name of any officer of the said several companies respectively shall go and be paid wholly to the company whose officer shall sue, seems very strongly to point to this conclusion.

Judgment for the defendant.

Solicitors for plaintiff: *Prideaux & Sons.*
Solicitors for defendant: *Ruddle & Brown.*

(1) 14 C. B. 1, 14. 18 Jur. 333.

THE QUEEN *v.* THE GUARDIANS OF THE ABERGAVENNY UNION.

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Nov. 25.
Q. B. D.

Poor Law—Settlement by Residence under 39 & 40 *Vict. c* 61, *s.* 34—*Removal, Order of, made without Corroboration—Corroboration before Sessions on Appeal.*

An order of removal was made by justices in respect of an alleged settlement under 39 & 40 Vict. c. 61, s. 34, which provides that an order of removal in respect of a settlement acquired under that section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or Court think sufficient. There was no corroborative evidence before the justices who made the order. Upon appeal to the quarter sessions against the order, the grounds of appeal were, first, that the pauper had not acquired a settlement under 39 & 40 Vict. c. 61, s. 34; and, secondly, that there was no corroborative evidence before the justices who made the order of removal. Corroborative evidence was tendered on behalf of the respondents at the sessions, and received by the Court, who considered the same sufficient, but quashed the order of removal on the ground that, as a matter of law upon the facts proved, the pauper had not acquired a settlement under 39 & 40 Vict. c. 61, s. 34:—

Held, that the sessions were right in receiving the corroborative evidence, but that (the case being governed by *Reg.* v. *Brampton Union* (3 Q. B. D. 479)), they were wrong in holding that the settlement was not acquired, and that consequently the order of removal must stand good.

CASE stated from quarter sessions on appeal against an order of removal. The quarter sessions quashed the order of removal subject to a case. The facts sufficiently appear from the judgment.

Nov. 6. *Lawrence*, for the appellants. The settlement was alleged to have been acquired under 39 & 40 Vict. c. 61, s. 34. The order of removal was a nullity, being made without the corroboration which is required by that section. The existence of such corroboration is a condition precedent to the jurisdiction of the justices to make the order. The Court of quarter sessions has no original jurisdiction to make an order of removal. The existence therefore of corroboration before them could not cure the invalidity of the original order. The words "or Court" in the section only mean that the sessions are not necessarily to be satisfied with the same corroboration as existed before the justices. Assuming that the sessions were right in holding that corroboration before them was sufficient, it must be admitted that, on the

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Q. B. D.

question whether a settlement had been acquired in this case, the decision in *Reg.* v. *Guardians of Brampton Union* (1) is undistinguishable.

Maddy, for the respondents. It is a general principle with regard to appeals to quarter sessions that an appeal is a rehearing, and that the sessions go into the case de novo, irrespective of the evidence given before the justices. This principle is clearly laid down in *Reg.* v. *Pilgrim.* (2) Lush, J., there says in giving judgment, "Generally speaking on appeal to the quarter sessions, the justices are not limited to the evidence before the petty sessions, but they are to hear the whole matter de novo, and the issue is the same, and the justices are put in the same position as the justices in the Court below. It is only in cases in which the particular statute giving the appeal limits the inquiry to the same evidence, that the quarter sessions are precluded from going into fresh evidence, but when there is no such limitation, either expressly or by implication, the matter is at large, and the quarter sessions are to rehear the whole matter and give their judgment upon all the evidence that is brought before them." It is contended that this principle applies, and that the sessions were entitled to hear the corroborative evidence tendered before them, and if satisfied with it to affirm the order of removal though there was no corroboration before the justices.

Lawrence, in reply.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Manisty and Bowen, JJ.), was delivered by

MANISTY, J. This was a case stated for the opinion of this Court by the Court of quarter sessions for the county of Monmouth, the question being whether an order of the Court of quarter sessions, quashing an order of two justices of the peace for the removal of one Jane Williams from the Abergavenny Union to the Monmouth Union, was good in law.

The facts were as follows: Jane Williams is the widow of James Williams who died in February, 1879. In May, 1871, James Williams and his then wife Jane went to reside in Mon-

(1) 3 Q. B. D. 479. (2) Law Rep. 6 Q. B. 89.

mouth Union, and continued to do so until James died in February, 1879. In February, 1879, after the death of her husband, Jane went to reside in the Abergavenny Union and became chargeable thereto in March following. The pauper and her husband resided continuously in the parish of Skinfrith in the Monmouth Union from 1871 to 1876, in such manner and under such circumstances in each of the years between 1871 and the 1st of January, 1876, as would in accordance with the statutes in that behalf render her and her husband irremoveable therefrom.

In 1876, and subsequently, the pauper and her husband received relief from the Monmouth Union while residing in it. On the 26th of March, 1879, an order was made by two justices for the removal of the pauper to the Monmouth Union. The order was made upon the evidence of the pauper only without any corroboration. Against that order the guardians of the Monmouth Union appealed to the quarter sessions on the grounds, among others, first, that the pauper had not acquired a settlement in their union by residence for a term of three years prior to February, 1879, according to the 34th section of 39 & 40 Vict. c. 61; and, secondly, that there was no corroboration of the pauper's evidence before the justices who made the order of removal.

The 34th section is as follows: "When any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremoveable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise: provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or Court think sufficient."

In support of the first ground of appeal the appellants contended that this section was not retrospective, and cited the case of *Reg.* v. *Ipswich Union* (1) in which it was held that a pauper who had resided in a parish for three years ending before the 15th of August, 1876, when the Act passed, but had ceased to reside

(1) 2 Q. B. D. 269.

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Manisty, J.

in the parish before that day, did not acquire a settlement in it under s. 34.

In support of the second ground of appeal, the appellants contended that the order of removal, having been made by the justices without any corroborative evidence, was bad by the 34th section of 39 & 40 Vict. c. 61, and that the Court of quarter sessions could not receive evidence of corroboration. The Court held that it was competent to them to receive, and they did receive, corroborative evidence which they considered to be sufficient, but on the authority of the case of *Reg.* v. *The Ipswich Union* (1), they decided that the pauper had not acquired a settlement by residence within 39 & 40 Vict. c. 61, s. 34; consequently they quashed the order of removal subject to the present case.

The question submitted to us is whether the order of the Court of quarter sessions was good in law. If yea, then the order is to stand confirmed, and the appeal is to be allowed with costs. If this Court is of opinion that the order of the Court of quarter sessions was wrong, then it is to be quashed, and the order of removal is to stand, and the appeal is to be dismissed with costs. We are of opinion that the Court of quarter sessions was right in holding that they could receive corroborative evidence, but that they were wrong in deciding that the pauper had not gained a settlement by residence in the Monmouth Union. The case of *Reg.* v. *Guardians of the Brampton Union* (2) is an express decision in favour of the respondents upon the latter point. That case was not called to the attention of the quarter sessions. If we entertained any doubt as to the correctness of it, we should consider ourselves bound by it, but we do not entertain any such doubt. The distinction between the Ipswich case and the Brampton case is that in the Ipswich case the pauper had left the union upon which the order of removal was made before the passing of 39 & 40 Vict. c. 61, whereas in the Brampton case and in the present case the converse is the fact.

As regards the reception by the quarter sessions of corroborative evidence, we entertain some doubt whether they could have received it if the only ground of appeal had been that the order of removal was a nullity, owing to its having been made upon the

(1) 2 Q. B. D. 269.

(2) 3 Q. B. D. 479.

evidence of the pauper only without corroboration. It may be that the sessions should in that case have dismissed the appeal, leaving the appellants to apply to this Court to quash the order of removal, in which case, assuming the order to have been quashed, the respondents (the Abergavenny Union) could have applied for a fresh order of removal. But that was not the only ground of appeal; on the contrary, as already mentioned, the first ground of appeal was that the pauper had not gained a settlement by residence in the Monmouth Union, in accordance with the 34th section of 39 & 40 Vict. c. 61. In order to decide that point it was not only competent to the quarter sessions to receive corroborative evidence, but they could not decide it without doing so. By the 2nd section of 13 & 14 Car. 2, c. 12, it is enacted that persons aggrieved by an order of removal made by two justices may appeal to the quarter sessions, who are required to do them justice according to the merits of their case. So that if the order of the quarter sessions were to stand, there would be a decision on the merits against the Abergavenny Union, and no new order of removal could be obtained.

The conclusion at which we have arrived is that the quarter sessions were right in receiving the corroborative evidence, but that, the evidence being satisfactory, they were wrong in deciding that the pauper had not gained a settlement by residence in the Monmouth Union.

The result is that the order of the Court of quarter sessions is quashed, the order of removal stands, and the appeal is dismissed with costs.

Order of sessions quashed.

Solicitor for appellants: *R. J. Child, for F. J. A. Williams.*
Solicitor for respondents: *T. Wilkinson, for Nesbitt.*

1880
Nov. 4.

THE MIDLAND WAGGON COMPANY *v.* THE POTTERIES, SHREWSBURY AND NORTH WALES RAILWAY COMPANY.

Ex. D.

Railway—Execution by Judgment Creditor—Protection of Rolling Stock and Plant—The Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.

19 Ch D 480

The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act, 1867, s. 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic.

THIS was an application on the part of the defendants for an order that the sheriff of Salop should withdraw from possession of the office furniture, fittings, materials, and effects seized by him under a writ of fi. fa. in the action against the goods of the defendants, on the ground that the same were not liable to be so taken by virtue of 30 & 31 Vict. c. 127, s. 4. (1)

The application under s. 5 (2) of the above-mentioned Act was made at chambers, and was referred by the judge to the Court.

(1) 30 & 31 Vict. c. 127, s. 4 enacts: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations, or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, ... where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery in England or in Ireland, according to the situation of the railway of the company; and all money received by such receiver or manager, shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed, under the direction of the Court, in payment of the debts of the company and otherwise, according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver, or such receiver and manager."

(2) Sect. 5 enacts: "If in any case where property of a company has been taken in execution a question arises whether or not it is liable to be so taken notwithstanding this Act, the same may be heard and determined on an application by either party by summons in a summary way to the Court out of which the execution issued, or if the Court is one of the Superior Courts of Law, then

In 1876 the plaintiffs obtained judgment by default in this action. In 1880, in consequence of the report of an inspector appointed to ascertain the condition of the railway, and of the inability of the directors of the company to make the repairs reported to be necessary, the Board of Trade recommended to the directors of the defendant company that the line should be closed, and the line was accordingly closed on or about the 22nd of June. The sheriff immediately afterwards seized the engines, rolling stock, and a number of other things on the railway under a fi. fa.; the judgment in this action not having been satisfied. A question was raised on the affidavits whether it was intended to re-open the line, or whether it would be permanently closed, but it is unnecessary to set out the evidence on this point.

J. W. Batten, for the defendants. The rolling stock and plant is absolutely protected from seizure from the time at which the words of the statute have once been satisfied by the opening of the line. The Act was passed not merely to prevent the inconvenience of having a line closed by an execution being put in but to regulate the rights of the debenture-holders and other creditors. The effect of ss. 4 and 23 (1) is to make the rolling stock and

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to a judge of any one of those Courts, and such determination shall be final and binding."

This Act is made perpetual by 38 & 39 Vict. c. 31.

(1) 30 & 31 Vict. c. 127, s. 23, enacts: "All money borrowed or to be borrowed by a company on mortgage or bond or debenture stock, under the provisions of any Act authorizing the borrowing thereof, shall have priority against the company and the property from time to time of the company over all other claims on account of any debts incurred or engagements entered into by them after the passing of this Act: Provided always, that this priority shall not affect any claim against the company in respect of any rent-charge granted, or to be granted, by them in pursuance of the Lands Clauses Consolidation Act, 1845, or the Lands Clauses Consolidation Acts Amendment Act, 1860, or in respect of any rent or sum reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company which is entitled to rank in priority to, or pari passu with, the interests or dividends on the mortgages, bonds, and debenture stock; nor shall anything hereinbefore contained affect any claim for land taken, used, or occupied by the company for the purposes of the railway, or injuriously affected by the construction thereof, or by the exercise of any powers conferred on the company."

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EX. D.

plant part of the security of the debenture holders. If necessary it could be shewn that this line is intended to be re-opened, but even if it were stopped absolutely the execution would be wrong.

W. G. Harrison, Q.C. (*Archibald*, with him), for the plaintiffs. The statute contemplates only the case of a railway which is a going concern, and not one which has closed. Some limitation must be read into the Act, otherwise it would protect from any execution anything once used on the railway. The Act shews that the proper limitation is to say that only railways in actual work are included, otherwise when a railway is closed, and by a lease of the line or otherwise can never be opened again, the protection from execution would continue. A railway which is not a going concern cannot be said to be using engines, rolling stock, and so on, nor is the appointment of a receiver as provided by the latter part of s. 4 applicable to the case of a railway with no earnings and nothing to receive. The affidavits shew that the stoppage of the railway is not a mere temporary matter, but must be permanent from want of means to make the repairs, and there is a distinction between these two cases. At all events, many of the articles taken do not come within the definition of rolling stock and plant in s. 4.

J. W. Batten, in reply.

Farwell, appeared for the sheriff.

POLLOCK, B. The question raised in this case, which has been very ably argued on both sides, is one of considerable general importance, and one that has not hitherto, as far as I know, been dealt with in any court of law or equity. In giving our decision we lay aside the question what particular things come within the description rolling-stock and plant. That is a matter of detail that can be settled hereafter. Another question which it is not necessary to consider is, whether the railway will be reopened at any future time. For the purposes of this argument, I will assume that the railway is closed through financial difficulties, which may be practically taken as pointing to the conclusion that the line will not be opened again for traffic. Under these circumstances we are called upon to put a construction on s. 4 of 30 & 31 Vict. c. 127, so far as it relates to the protection of rolling stock and

plant from seizure. I do not think we get much assistance from the clauses 6 to 22, which come under the heading "Arrangements." The sections on which my judgment turns are the 4th and 23rd. Now it is well known what were the facts relating to the position of railways which were existing before the passing of this Act, and which led to its coming into existence. At that time, as now, there were railway companies in existence possessed of large tracts of land forming the permanent way, with a quantity of rolling stock and plant consisting of engines, carriages, trucks, and also of tools and the like, necessary to keep in repair either the permanent way or the rolling-stock. In the case of such a railway engaged in carrying goods or passengers, it was very inconvenient that under a fi. fa. the rolling stock or plant should be seized by the sheriff, so as to produce a stoppage of the railway. But the inconvenience did not end there, because differences arose between the persons who had provided the capital of the railway in different ways, and there was a long-continued contest as to who among the various creditors of the companies was to have the priority. It is a marked feature of this Act, that while it deals with the seizure of rolling stock by fi. fa., it also deals with the priorities of debenture holders and other creditors of the companies between themselves. The 4th section of the Act is very wide in its terms, "the engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects constituting the rolling stock and plant used or provided by a company for the uses of the traffic on their railway, or of their stations or workshops, shall not after their railway, or any part thereof, is open for public traffic be liable to be taken in execution at law or in equity at any time after the passing of this Act." Now, as to the description of what is to be protected, nothing could be more full. The only controlling words are those pointed out and relied on by Mr. Harrison, "used or provided by a railway for the purposes of the traffic on their railway." No doubt the things which have been seized in this case had been provided or used for the purposes of the traffic on the railway, but were they used or provided in such a manner as to bring them within the protection of this statute? Mr. Harrison says that the protection extends only to rolling stock or plant in use at the time when the protection was

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claimed, and therefore only to the case of a railway which is a going concern. I should have great difficulty in putting such a narrow interpretation on the section. It seems to me that the meaning of the section is that it was intended that the creditors should not be able to seize the rolling-stock or plant after the railway company has once become a going concern. Even in the extreme case, that of a company which is in such a position that it can never use its rolling-stock or plant again, still they are protected as being within the very words of the statute. The language of the remainder of s. 4, and also of s. 23, seems to me to confirm the view I have taken. Section 4 provides for the appointment of a receiver, and, if necessary, of a manager of the undertaking of the company, and for the distribution of the moneys received by such receiver or manager, "according to the rights and priorities of the persons for the time being interested therein;" and s. 23 provides that money borrowed on mortgage or bond or debenture stock is to have priority over all other debts. No doubt this made a revolution in the law, as it placed mere mortgagees or bond holders above all other creditors. But it is important to the companies to be able to raise money, and for this purpose it is essential that the debenture holders should know exactly the extent of their security. In order to carry out this object the rolling stock and plant are made, as it were, to be affixed to the soil, and part of that which is pledged as a permanent security to the debenture holders. Subject, therefore, to the inquiry as to which of these articles do not come within the terms of s. 4, and so are not exempt from seizure, the sheriff must be ordered to withdraw.

STEPHEN, J. I am of the same opinion. The question is, whether certain goods seized by the sheriff are to continue in his possession, or whether he is to be ordered to withdraw. I think he should be ordered to withdraw. Section 4 provides that the rolling-stock and plant used or provided by the company, shall not, after the railway is open for public traffic, be taken in execution in law or equity. This seems to me to be perfectly general, unless there is something to be found in the Act to narrow its effect. Mr. Harrison suggested a consideration which shewed

that the words required some limitation, otherwise some absurd consequences might follow. Thus, tools might acquire exemption from being ever taken in execution, from the mere fact of their once having formed part of the railway plant. No doubt, therefore, some limitation is required, but the only one that is necessary is the insertion of the words "so long as they continue the property of the company," which words seem to me of necessity implied. Then the section gives to a creditor who has recovered judgment the right to appoint a receiver. It is argued that this implies that the section relates only to railways which are going concerns. My view is that the utmost that can be said is that the section contemplates railways which are going concerns as the most common case, but does not exclude the case of railways which are not going concerns. The case has been put of a company which has actually stopped, and which has ceased to be a railway except in name, but the fact that such a case is not provided for in the section does not satisfy me that the section ought to bear the narrow construction. The sections as to arrangements do not throw much light on the matter, but it seems to me that s. 23 removes any doubt that might have existed under s. 4. It is obvious that the position of railways is exceptional, and that the rights of creditors and debenture-holders are difficult to regulate. It is necessary to balance their interests, and possibly to sacrifice the interests of one class to those of another. The legislature has said under these circumstances that debenture-holders are to have the priority. Our order must be that the sheriff be directed to withdraw in respect of all the matters answering the description given in s. 4. If there is any dispute, application must be made at chambers to determine what articles come within the section.

Order absolute to sheriff to withdraw.

Solicitors for plaintiffs: *Sharpe, Parkers, Pritchard, & Co.*

Solicitors for defendants: *S. F. & H. Noyes.*

Solicitors for sheriff: *Chester & Co., for G. D. Warren, Shrewsbury.*

1880
Nov. 29.
(C. A.)
Ex. D.

[IN THE COURT OF APPEAL.]

WINSPEAR *v.* THE ACCIDENT INSURANCE COMPANY, LIMITED.

Insurance—Injury by Accident—Drowning—Epileptic Fit—Construction of Policy.

W. effected an insurance with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to W.'s legal representatives, should he sustain "any personal injury caused by accidental, external, and visible means," and the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." During the time the policy was in force, and whilst he was crossing and fording a stream, W. was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, but he did not sustain any personal injury to occasion death other than drowning:—

Held, that W.'s death was occasioned by an injury within the risk covered by the policy, and to which the proviso did not apply.

APPEAL from the decision of the Exchequer Division on a special case stating the facts, of which the following are all that are material.

The plaintiff is the executrix of William Winspear, deceased, who effected with the defendant company an insurance against accidental injury. The policy of insurance was dated the 5th of February, 1879, and the full amount insured by it was 1000*l*. By such policy the defendant company agreed as follows:—"That if at any time before the expiration of one year from the date of this policy, or at any time thereafter whilst the insured shall duly pay the above-mentioned premium according to the provisions and conditions of this policy, or any increased or decreased premium agreed to be received by the directors, the insured shall sustain any personal injury caused by accidental, external, and visible means within the intention of this policy and the provisions and conditions thereof, and the direct effect of such injury shall occasion the death of the insured within three calendar months from the happening of such injury, then the funds and property of the company shall be subject and liable to pay to the legal personal representatives of the insured, within three calendar months after it shall have been proved to the satisfaction of the

directors of the company that the death of the insured was occasioned as aforesaid, the amount insured under the provisions of this policy." There then followed an agreement by the company to pay a weekly compensation in case the injury which the insured should sustain should not be fatal. The policy afterwards contained a proviso of which the following is all that is material for the purpose of this report, viz., "Provided further that the insured shall not be entitled to make any claim under this policy for any injury from any accident, unless such injury shall be caused by some outward and visible means of which proof satisfactory to the directors can be furnished, and that this insurance shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease, or by any medical or surgical treatment or operation rendered necessary by disease, or to any death arising from disease, although such death may have been accelerated by accident."

During the time this policy was in force, viz. on the 26th of May, 1879, the insured, whilst crossing and fording a stream or brook called the river Rea, in Edgbaston, Birmingham, was seized with an epileptic fit, and whilst in such fit fell down in the stream, and was drowned. The insured did not sustain any personal injury to occasion death other than drowning.

The question for the opinion of the Court was whether the death happened under such circumstances as to entitle the plaintiff to make a claim under the policy in respect of the death of the insured.

The Exchequer Division decided that the plaintiff was so entitled, as the death was occasioned by an injury within the meaning of the policy, and judgment was accordingly entered for the plaintiff.

The defendants appealed.

Cohen, Q.C., and *Gainsford Bruce*, for the defendants. The insurance is not against death like an ordinary life policy, but is an insurance only against accidental injury, and therefore it is the injury which the insured received which is the thing to be looked to.

[LORD COLERIDGE, C.J. Here he died by drowning.]

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WINSPEAR v. ACCIDENT INSURANCE CO.

(C. A.) Ex. D.

It must be admitted that it has been decided that drowning would be an injury within the meaning of the policy; (1) but here there would have been no drowning had the insured not had an epileptic fit. It was the fit which caused the drowning, for even after the insured had fallen into the stream he could have got his head out of the water but for the fit, as the stream was shallow and could be forded. The death, therefore, was from an injury caused by the fit, or from "weakness or exhaustion consequent upon disease," and came, therefore, within the terms of the proviso in the policy. The case of *Sinclair* v. *Maritime Passengers Assurance Co.* (2) shews that death from a sunstroke is from a natural cause, and not from "an accident," within the meaning of a policy like the present.

[LORD COLERIDGE, C.J. What do you say to the case of *Reynolds* v. *Accidental Insurance Co.* (3) which is very like the present? There the insured would not have been drowned but for insensibility.]

The present policy is different from the policy in that case. In fact, the proviso in the present policy on which the defendants rely, was inserted in consequence of that case. There are only two other decisions on accidental policies, they are *Fitten* v. *Accidental Death Insurance Co.* (4) and *Smith* v. *Accident Insurance Co.* (5) In the latter case the insurers were held to be protected by a clause in the policy exempting them from liability in case of death from erysipelas, where the insured died of erysipelas though brought on from an accidental cut, and in the other case the Court looked to the real and not to the proximate cause of the death. Here the real cause of the death was the fit.

Crump (*Tarleton* with him), appeared for the plaintiff, but was not called upon.

LORD COLERIDGE, C.J. I am of opinion that this judgment should be affirmed, and that on very plain grounds. It appears to be clear from the statement in this case, that the insured died

(1) See *Trew* v. *Railway Passengers Assurance Company*, 6 H. & N. 839; 30 L. J. (N.S.) (Ex.) 317.

(2) 30 L. J. (N.S.) (Q.B.) 77.

(3) 22 L. T. (N.S.) 820.

(4) 17 C. B. (N.S.) 122; 34 L. J. (N.S.) (C.P.) 38.

(5) Law Rep. 5 Ex. 302.

from drowning in the waters of the brook whilst in an epileptic fit, and drowning has been decided to be an injury caused in the words of this policy "by accidental, external, and visible means." I am therefore of opinion that the injury from which he died was a risk covered by this policy, and the only question then remaining is whether the case is within the proviso which provides that the insurance "shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease." It is certainly not within the first part of this proviso, because the death was not so occasioned, neither does it appear to me that the cause of the death was within those latter words of the proviso. The death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning. I am of opinion that those words in the proviso mean what they say, and that they point to an injury caused by natural disease, as if for instance in the present case, epilepsy had really been the cause of the death. The death, however, did not arise from any such cause, and those words have no application to the case, and therefore the judgment of the Exchequer Division must be affirmed.

BAGGALLAY and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Bird, Moore, & Ratcliffe.*
Solicitors for defendants: *Wynne-Baxter & Rance.*

1880
Nov. 15.
Q. B. D.

TENANT & CO. *v.* ELLIS & CO.

Practice—Costs—County Courts Admiralty Jurisdiction Act, 1868—31 & 32 *Vict. c.* 71—*Rules of Court*, 1875—*Order LV., rule* 1.

Sect. 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that persons taking proceedings in a superior Court, which they might under s. 3 of that Act have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior Court, is inconsistent with and repealed by Order LV., rule 1, of the Rules of the Supreme Court, 1875.

THIS was an action brought in the High Court to recover a sum of 73*l.* for damage to cargo.

The matter was admittedly within the jurisdiction of the county court under s. 3 of 31 & 32 Vict. c. 71. The action was tried before Field, J., and the jury returned a verdict for the plaintiffs for the amount claimed. The judge gave judgment for that amount; but, no application having been made to him for that purpose, he did not certify under s. 9 of the above Act that the cause was a proper one to be tried in the superior Court.

The plaintiffs having applied to a master to tax their costs of action, the master refused, on the ground that, less than 300*l.* having been recovered, and no certificate having been given by the judge, the plaintiffs were by the above last-mentioned section deprived of their right to costs. The plaintiffs then applied to the Court for an order to the master to tax.

Patchett, Q.C., for the plaintiffs.
Hilbery, for the defendants.

FIELD, J. I am of opinion that an order must be made to the master to tax the plaintiffs' costs. This was an action brought in the superior Court to recover a sum of 73*l.* for damage to cargo. The action was tried before myself and a jury, and the jury returned a verdict for the plaintiffs for the amount claimed. No application for good cause shewn was made under Order LV., rule 1, to deprive the plaintiffs of costs; they are therefore primâ facie entitled to them. But then it is said that as the matter was within the jurisdiction of the county court under 31 & 32 Vict.

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c. 71, s. 3, sub-s. 3, the plaintiffs, having recovered less than 300*l.*, are disentitled to costs by virtue of s. 9 of that Act. But that section is, in my opinion, inconsistent with the terms of Order LV., and, there being no provision in the Judicature Acts expressly keeping it alive, it must be taken to be repealed. I wish I could discover some reason why the legislature should have thought fit to preserve s. 5 of the County Courts Act, 1867, and omitted to preserve s. 9 of the Act of 1868, which seems to be in pari materiâ. The omission may have been unintentional, but whether it was so or not, the latter section must none the less be taken to be repealed.

MANISTY, J. I am of the same opinion. The case of *Garnett* v. *Bradley* in the House of Lords (1) decides that all Acts of Parliament dealing with costs, which are inconsistent with Order LV., are gone unless they are specially preserved. Certain sections of the County Courts Act, 1867, are preserved, but there is no similar provision with regard to the Act of 1868. The master must tax the plaintiffs' costs.

Order accordingly.

Solicitor for plaintiffs: *Mark Sheppard.*
Solicitors for defendants: *F. W. & H. Hilbery.*

[IN THE COURT OF APPEAL.]

Nov. 8.

(C. A.)
Q. B. D.

THE QUEEN *v.* MEWS AND OASTLER.

Criminal Lunatic, Maintenance of—Upon what Funds chargeable—3 & 4 *Vict.* c. 54, s. 2—27 & 28 *Vict.* c. 29, s. 2—*Prison Act*, 1877, 40 & 41 *Vict.* c. 21.

Notwithstanding the Prison Act, 1877, the expense of maintaining a prisoner removed to a lunatic asylum is chargeable by order of justices upon the county, in which the prison from which he was removed is situate.

Affd by H.L. 8 QBD 339 H.L.

APPEAL from rule for mandamus, made absolute by Denman, J., and Pollock, B.

Mary Bray was convicted of larceny at the Surrey Quarter

(1) 3 App. Cas. 944.

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Sessions on the 24th of January, 1879, and sentenced to eighteen calendar months' imprisonment in the House of Correction, situate at Wandsworth in the said county. On the 18th day of February following she was certified to be insane, and was, by a warrant of the Secretary of State for the Home Department, removed on the 21st of February from the said prison to the Surrey County Lunatic Asylum at Wandsworth in the same county. She had no settlement in England, and was not possessed of any property applicable to her maintenance.

On the 9th of July following, during the currency of the sentence, and whilst the prisoner still remained insane, application was made on behalf of the Solicitor to the Treasury to John Mews and Josiah Oastler, Esquires, two justices sitting at Petty Sessions, held at Newington, Surrey, for an order upon the treasurer for the county of Surrey for the maintenance of the prisoner, pursuant to 3 & 4 Vict. c. 54, s. 2, and 27 & 28 Vict. c. 29, s. 2 (1); but the said justices refused to make such order, declining to hear evidence in support of the application, it having been contended before them on behalf of the county treasurer that the liability to maintain a criminal lunatic under 3 & 4 Vict. c. 54, and 27 & 28 Vict. c. 29, was extinguished by the Prison Act, 1877, 40 & 41 Vict. c. 21. (2)

(1) By 27 & 28 Vict. c. 29, s. 2, a secretary of state may, upon receipt of such certificate of insanity as is therein mentioned, "direct by warrant" that any prisoner becoming insane "shall be removed" from the prison in which he is confined "to such lunatic asylum or other proper receptacle for insane persons as the said secretary of state shall judge proper and appoint."

By 3 & 4 Vict. c. 54, s. 2, "in all cases as aforesaid" (i.e., in cases within 3 & 4 Vict. c. 54, s. 1, for which s. 2 of 27 & 28 Vict. c. 29, which repeals 3 & 4 Vict. c. 54, s. 1, is substituted), it is enacted that "Unless one of her Majesty's principal secretaries of state shall otherwise direct, it shall be lawful for . . . any . . . two justices of the peace of the county, city, borough, or place where such person is imprisoned," to inquire into the settlement of such prisoner and make an order on the parish of such prisoner's settlement for such prisoner's maintenance; "and when the place of settlement cannot be ascertained, such order shall be made upon the treasurer of the county, city, borough, or place where such person shall have been imprisoned."

(2) Prison Act, 1877, s. 4: "On and after the commencement of this Act all expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by parliament."

Sect. 57: A "prisoner," for the purposes of this Act, means any person

On the 21st of July, Lord Coleridge, C.J., and Denman, J., granted a rule nisi for a mandamus to the said justices directing them to hear and determine the application for the order upon the county treasurer, and on the 30th of July the said rule was made absolute by Denman, J., and Pollock, B.

The justices, at the instance of the county treasurer, appealed.

The Solicitor-General (*Sir F. Herschell, Q.C.*), and *Edward Clarke, Q.C.*, for the appellants. The expense of maintenance of criminal lunatics is an expense which ought to be defrayed "out of moneys provided by parliament" in accordance with sects. 4 and 57 of the Prison Act, 1877 (40 & 41 Vict. c. 21). The definition of "maintenance of a prisoner" in the latter section includes every expense of a prisoner from committal to discharge, the words "or otherwise" being inserted to make the definition as comprehensive as possible. Before the Prison Act the order would have been perfectly proper, but that Act makes such extensive alterations in defraying prison expenses generally, that it is reasonable to suppose that the maintenance of prisoners who should happen to become insane was not intended to be defrayed out of a particular and distinct fund. A different construction of the statutes would work injustice to the counties, any one of which under the scheme of the Prison Act, 1877, might have to defray the maintenance of a prisoner originally coming from any other, inasmuch as every prison is open to prisoners coming from the whole country, and as a matter of fact all the female prisoners from Surrey are at the present time confined in Middlesex. It is an anomaly that the counties bear

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committed to prison on remand or for trial, safe custody, punishment or otherwise, and the "maintenance of a prisoner" includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would, if this Act had not passed, have been payable by a prison authority; with this proviso, that nothing in this Act shall exempt a prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise, which he would have been liable to pay if this Act had not passed."

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the expense of insane prisoners, and the Consolidated Fund the expense of sane prisoners. It is not necessary, however, to rely upon these arguments, for within the meaning of the Prison Act, 1877, a prisoner who becomes lunatic, and is removed to a lunatic asylum, remains constructively in the prison from which he is removed during the period of his sentence.

Sir J. Holker, Q.C., and *Poland*, for the Crown. Assuming that some hardship is worked upon the counties—and the same hardship would have been worked under the powers of removal vested in a secretary of state by the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 65 — the only question is whether the Act 3 & 4 Vict. c. 54, s. 2, has been repealed by the Prison Act, 1877. The repeal, if any, is by implication. Nothing could be more distinct than the provisions of 3 & 4 Vict. c. 54, s. 2; they were enacted on the assumption that a prisoner becoming lunatic is no longer a prisoner in the proper sense of the term at all. There could be no implied repeal of provisions so distinct as these, and as there is no express repeal, the order made under them is perfectly good.

LORD SELBORNE, L.C. I am of opinion that this order was right. The Prison Act, 1877, throws prison expenses upon the Consolidated Fund, but the expense which we have to consider here is not an expense of that nature, being incurred in respect of a person not treated as a prisoner but as a lunatic. With regard to prisoners becoming lunatics, I think that the Act 3 & 4 Vict. c. 54, as amended by 27 & 28 Vict. c. 29, remains in full force.

LORD COLERIDGE, C.J. I am of the same opinion. The Act 3 & 4 Vict. c. 54 is not mentioned in the Act of 1865 or the Act of 1877, and is clearly unaffected by the Act of 1877.

BRETT, L.J. I think that this order was properly made if the Act 3 & 4 Vict. c. 54 is still in existence. Expressly repealed it certainly is not. Nor can it be impliedly repealed if by any reasonable construction the two Acts, 3 & 4 Vict. c. 54 and the Prison Act, 1877, can be read together. And I think that they can be read together on the very reasonable supposition that the

Act of 1877 omits the case of lunatics as being dealt with by 3 & 4 Vict. c. 54.

Judgment affirmed.

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Solicitors for justices: *Smallpiece & Son, for F. F. Smallpiece, Guildford.*

Solicitor for Crown: *Solicitor to the Treasury.*

[IN THE COURT OF APPEAL.]

Nov. 15.

(C. A.) C. P. D.

THE WEST INDIA AND PANAMA TELEGRAPH COMPANY, LIMITED, *v.* THE HOME AND COLONIAL MARINE INSURANCE COMPANY, LIMITED.

Insurance (Marine)—General Words—Explosion of Boiler of Steamer, whether a Peril insured against—Contributory cause of Loss, and proximate Cause.

The explosion of the boiler of a steamer is a peril insured against by a marine policy in the ordinary form.

A steamer insured by a time policy became a wreck, by reason of the explosion of her boiler in ordinary weather under ordinary pressure of steam. The causa sine quâ non of the explosion was that the boiler had become, from external and internal corrosion by bilge water and "scale," too thin to resist the steam. The corrosion might have been discovered, and in some measure prevented, by ordinary care:—

Held, affirming the judgment of Baggallay, L.J., that though unseaworthiness was a causa sine quâ non of the loss, the explosion was a proximate cause, and a peril insured against.

APPEAL of the defendants from the judgment of Baggallay, L.J., in an action tried by him without a jury.

The plaintiffs had insured the steamer *Investigator* with the defendants by a time policy effected on the 9th of May, 1878. The *Investigator* was a steam vessel of 569 tons register, and had been purchased by the plaintiffs in the early part of the year 1875, for voyages on telegraphic purposes between the island of St. Thomas and the continent of America. Shortly after the purchase the vessel was thoroughly overhauled and repaired, and her boilers and engines surveyed and found to be in good order and condition.

The insurance covered the period from the 6th day of May, 1878, to the 5th day of May, 1879, and was for the sum of 5000*l.*

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upon—first, the hull, stores, &c., valued at 7500*l.*; secondly, the paying out and picking up machinery, &c., valued at 4000*l.*; and thirdly, the machinery, boiler, &c., valued at 3500*l.*; average payable on each interest separately or together. The perils insured against were described in the ordinary form, as follows:—

"And touching the adventures and perils which the said company [the defendants] are made liable unto, or are intended to be made liable unto by this insurance, they are of the seas, men-of-war, *fire*, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of (sic) *all other perils, losses, and misfortunes that have or shall come to the subject-matter of this insurance, or any part thereof.*"

On the 8th of January, 1879, the *Investigator* was lying in the port of St. Thomas, and her master, having received orders to proceed to repair a break in the telegraphic cable between St. Thomas and San Juan, Porto Rico, weighed anchor about half past 10 on the morning of that day in fair weather. After making some fifteen revolutions, her engines were stopped to allow of the vessel's head canting round, and within a few seconds of their being so stopped, the port boiler burst, gutting the middle of the ship and blowing up her decks. The wreck of the hull was ultimately sold for 250*l.* Upon examination it was discovered that the bursting was due to the reduction of the shell of the boiler from three-eighths of an inch to less than one-eighth of an inch, and that such reduction was due chiefly to the action of bilge water upon its external surface, and to some, though to a less, extent by the accumulation of sediment and dirt, in the form commonly known as "scale," on the inside.

This action having been brought to recover the loss sustained in respect of the hull and stores, Baggallay, L.J., in a trial without a jury, gave judgment for the plaintiffs, being of opinion that the bursting of the boiler was a peril insured against by the policy, and that such bursting was due to the negligence of those who had charge of it, the negligence consisting in the engineers not examining the boiler from time to time, and in allowing it to

become corroded and reduced in thickness by the action of the bilge water, which might and ought to have been kept down by the pumps. (1)

The defendants appealed.

November 11, 12, 13. *Benjamin, Q.C.*, and *Arbuthnot*, for the defendants. The explosion of a boiler is not one of the perils insured against. This is a point of the first impression.

[COCKBURN, C.J. Without incurring such a peril, the navigation of a steamer cannot take place.]

Every risk remains with the owner unless it be specified in the policy, and a risk so incidental to navigation by steam as the explosion of a boiler ought to have been insured against by express words. It cannot be implied that the parties intended that it should be insured against. This loss was caused by the inherent vice of the subject-matter of the insurance, and it is well settled that underwriters are not liable for a loss so caused. The general rule is thus stated in Phillips on Insurance, 5th ed. at p. 1089. "From the enumeration already given of the perils usually insured against, it appears that insurers undertake to make indemnity only for damage arising from external accidents, not for that occasioned by the qualities or defects of the thing insured."

"The underwriter," it is said in Arnould on Insurance, 5th ed. pt. 3, ch. 1, p. 707, "indemnifies the assured against such losses only as are caused by the direct and violent operation of the perils insured against, and not against loss by the ordinary wear and tear of the voyage;" the insurance being not against what must happen, but what may happen. It was inevitable that this boiler should explode in course of time, and if the defendants are to be held liable, there is nothing to prevent shipowners insuring steamers equipped with boilers utterly unfit and inadequate.

(1) Upon the first point the learned judge referred to the United States cases of *Perrin* v. *Protector Insurance Co.*, 11 Ohio States Reports, 147, and *Citizens Insurance Case* v. *Glasgow*, 9 Missouri State Reports, 407, in the former of which it was held that explosion is a peril insured against by any ordinary United States policy describing the risks insured against as "of the seas, rivers, fires, enemies, pirates, rovers, assailing thieves, and all other losses or misfortunes which shall come to the damage of the said steamboat, according to the true intent and meaning of the said policy."

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[BRETT, L.J. If there had been no negligence, this loss would not have happened.]

Only the efficient cause of the loss is to be regarded; *Thompson* v. *Hopper* (1): *Fawcus* v. *Sarsfield* (2): and the efficient cause of the loss here was the thinness of the boiler, that is, the vice of the thing insured. The plaintiffs have not sued for the loss to the boiler itself.

[They also referred to the following authorities: *Dixon* v. *Sadler* (3); *Davidson* v. *Burnand* (4); *Jackson* v. *Union Marine Insurance Co.* (5); *Taylor* v. *Dunbar* (6); *Cullen* v. *Butler* (7); *Bœhm* v. *Combe* (8); *Dudgeon* v. *Pembroke* (9); *Paterson* v. *Harris* (10); *Anderson* v. *Morice.* (11)]

Cohen, Q.C., and *J. C. Mathew*, for the plaintiffs. The perils insured against comprise all perils incident to the navigation of the vessel, including those arising from the improper navigation of the vessel, which latter term comprehends improper management of the boiler and engines. It is established by authority that the perils of the sea insured against are not confined to perils arising from the external violence of the wind or waves: *Dixon* v. *Sadler* (12); *Davidson* v. *Burnand* (4); and that underwriters are liable for a loss caused by a peril insured against, although the peril may have been brought into operation by the negligence of the crew: *Busk* v. *Royal Exchange Assurance Co.* (13)

The passage from Phillips on Insurance, relied on by the other side, applies to goods; an attempt was made to apply the doctrine of that passage to a ship in *Dudgeon* v. *Pembroke* (9), but the House of Lords refused so to apply it. This policy is the ordinary form of policy by which a steamer is insured; if the argument for the defendants be correct, all insurances on steamers, that is, most modern insurances, have been for many years practically worthless. In the ordinary course of business, it must be

(1) 1 E. B. & E. 1038, overruling S. C. 6 E. & B. 937.
(2) 6 E. & B. 192.
(3) 8 M. & W. 895, affirming S. C. 5 M. & W. 405.
(4) Law Rep. 4 C. P. 117.
(5) Law Rep. 8 C. P. 572.
(6) Law Rep. 4 C. P. 206.
(7) 5 M. & S. 461.
(8) 2 M. & S. 172.
(9) 2 App. Cas. 284.
(10) 1 B. & S. 336; 30 L. J. (Q.B.) 354.
(11) 1 App. Cas. 713.
(12) 5 M. & W. 414.
(13) 2 B. & Ald. 73.

taken that an insurance against explosion was intended by the parties, and the common form, though an old one, must be construed liberally.

[COCKBURN, C.J. It is certainly a reasonable construction of the policy that explosion should be insured against.]

If explosion be included in the policy, there is nothing in the facts of this particular explosion to exonerate the defendants as underwriters. The facts shew gross negligence on the part of the crew, which underwriters cannot set up as a defence: *Dixon* v. *Sadler* (1), and even if the loss were attributable to wear and tear, either wholly or in part, that would be no answer: *Dudgeon* v. *Pembroke.* (2)

[They also referred to Meredith's Emerigon, ch. xii. s. 1, p. 286; *Carruthers* v. *Sydebotham* (3); *Merchants' Trading Co.* v. *Universal Marine Insurance Co.* (4); *Pickup* v. *Thames Marine Insurance Co.* (5); *Phillips* v. *Barber* (6); *Anderson* v. *Morice.* (7)]

Arbuthnot, in reply, cited *Blower* v. *Great Western Ry. Co.* (8)

Nov. 15. The following judgments were delivered:—

LORD SELBORNE, L.C. The question in this case is, whether a loss by the explosion of a boiler was or was not covered by a time policy on the steamship *Investigator,* dated the 6th of May, 1878. The insurance was for twelve months from that date, in port and at sea, at all times, and in all services, situations, and circumstances. The risks, to which the appellants, the insurers, were made liable, were described in the ordinary form: "of the seas, men-of-war, fire, enemies, &c., and of all other perils, losses, and misfortunes, that have or shall come to the hurt, detriment, and damage of the aforesaid subject-matter of this insurance or any part thereof." The ship, when about to leave the port of St. Thomas on the 8th of January, 1879, was reduced to a wreck (though not submerged or filled with water) by a sudden explosion of her boiler, in ordinary weather. The underwriters disputed

(1) 8 M. & W. 895, affirming S. C. 5 M. & W. 405.
(2) 2 App. Cas. 284.
(3) 4 M. & S. 77.
(4) Asp. Mar. Cas. vol. ii. p. 431.
(5) 3 Q. B. D. 594.
(6) 5 B. & A. 161.
(7) 1 App. Cas. 713.
(8) Law Rep. 7 C. P. 655.

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their liability on two grounds; first, that such an explosion was not a peril insured against within the true meaning of the policy; and, secondly, that (assuming it to be so) this particular explosion happened because the boiler was worn out, and that they were not liable for any loss due to that cause. Both these grounds of defence were overruled at the trial (without a jury) before Baggallay, L.J., and judgment was given for the plaintiffs, the assured. The present appeal is from that judgment.

Assuming (as for the purpose of this decision I think it right to assume) that such an explosion is not, properly speaking, "a peril of the seas," and that it cannot be brought within any of the other particular perils enumerated in the policy, the main question is whether it is within the general words with which the specification of the risks insured against concludes, "and all other perils, losses, and misfortunes," &c.?

The principle of construction applicable to those general words in policies of this description was explained by Lord Ellenborough in the case of *Cullen* v. *Butler* (1), cited during the argument. "As they must" (he said), "be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument, and which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." He proceeded to refer to an observation of Emerigon to the effect that phrases more or less similar had been introduced into various Continental forms of policies, to prevent doubts and disputes as to the extent and application of (what the writer described as) "the general rule that assurers answer for all loss and damages that happen on the sea." It is unnecessary to consider whether such a description of "the general rule" is not too wide, because the canon of construction laid down by Lord Ellenborough, if reasonably understood, is sufficient for the solution of the present question. In *Devaux* v. *I'Anson* (2) similar general words were held by Chief

(1) 5 M & S. 461. (2) 5 Bing. (N.C.) 519.

Justice Tindal and the other judges of the Court of Common Pleas, to cover damage to a ship occasioned neither by wind nor water, but by the strain on her timbers of cables employed by workmen to remove her from her berth in a dry dock in which she had been placed for necessary repairs. I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler, in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power, whether from excess of pressure in the boiler or from defects of safety valves, or from neglect or mismanagement making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of winds and defects or mismanagement of a ship's sails or tackle. I agree, therefore, on this point with the judgment of Baggallay, L.J., and with the decision in the Supreme Court of Ohio to which that learned judge referred. (1)

Upon the second point, the only material facts appear to be that, either through the access of bilge water without, or through the accumulation of "scale" within, the boiler, certain parts of the lower plate of the boiler had become worn in an unusual manner and to an extreme degree of thinness; that this was the cause of the inability of the boiler to resist a degree of steam pressure not otherwise extraordinary or improper; and that this unusual wearing away of the plate might have been prevented by proper care. It is certain that when the policy was effected this defective condition of the boiler (in whatever degree it may have then existed) was unknown to the assured. The defect was not, until several months after the date of the policy, sufficient to prevent the boiler from doing its usual work, though, being progressive, it eventually led to the explosion.

These facts cannot, in my judgment, amount to more than what was assumed by the House of Lords in *Dudgeon* v. *Pembroke* (2), viz., that the ship was unseaworthy, and that such unseaworthiness (unknown at the date of the policy to the assured) was the causa

(1) *Perrin* v. *Protector Insurance Co.* 11 Ohio Reports, 157.
(2) 2 App. Cas. 284.

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sine quâ non of the loss. That was a case on a time policy like the present, and the House decided that the assured on these assumptions were entitled to recover. That decision binds us. So far as negligence on the part of those who ought to have examined and attended to the state of the boiler may be an element in the present case, the same authority, as well as *Dixon* v. *Sadler* (1), shews that it is immaterial.

The appeal must be dismissed with costs.

The Lord Chief Justice of England agrees with this conclusion; and, though he is not responsible for my words, I understand him also to agree in the substance of the reasons which I have given.

BRETT, L.J. This case has been practically argued twice, and upon both occasions with remarkable force on both sides. To me personally it has been a case of the greatest difficulty, but in the result I have come to the same conclusion as the Lord Chancellor and the Lord Chief Justice of England.

The first question is, whether an explosion by steam is one of the perils insured against in an ordinary English policy like this. It was urged on the one side that it is not, on the ground that no peril is insured against in such a policy unless it arises from causes external to the ship. On the other side, it was said that such a policy covers every loss, which may happen at sea by a fortuitous accident, or even by the negligence of the captain and crew. The one contention seems to me far too narrow, and the other I think, as at present advised, to be too large. An English policy is to be construed according to the same rules of construction, which are applied by English Courts to the construction of every other mercantile instrument. Each term in the policy, and each phrase in the policy, is primâ facie to be construed according to its ordinary meaning. Where there are particular terms followed by a general phrase, that phrase is to be construed not as if it stood alone, but with regard to the policy in which it is inserted at the end of the particular terms. The argument, which was urged in favour of the necessity of the peril being caused by something external to the ship, seems to me to be fallaciously founded upon

(1) 8 M. & W. 895 affirming S. C. 5 M. & W. 405.

the interpretation, or suggested interpretation, of the first terms merely, i.e., "perils of the sea." In defining what losses are included in that term, some judges have used the words "external force" of the wind or waves. To me, however, with great deference, the word "external," when used with regard to a loss caused by the sea or by the elements seems to be surplusage. It is difficult to see how there can be any injury by reason of the sea itself or of the elements, including lightning, which could arise within the ship. The term "perils of the sea" has been determined by decisions, which we are not at liberty to overrule, to extend only to cover losses caused by sea damage, or by the violence of the elements, and not to embrace all losses happening at sea. Therefore we are not to say that this peril was within the term "perils of the sea." But that is not the only term in the policy. New terms have been introduced from time to time, although the last general phrase in the list has been inserted in all policies from the very first. Amongst the new particular terms which were from time to time introduced I believe that "fire" was one. But whether this be so or not, it seems to me that every time you introduce a new particular term you may alter the effect of the general phrase at the end, because I think it has been decided that the general phrase at the end does at least comprise all perils not of the same kind as those which are specifically enumerated, but of the like kind. Every time, therefore, you introduce a new particular term you introduce into the general phrase all losses or perils which are like to that new term, although they are not of a like kind to the perils before described.

I cannot at present accede to the view that under the general phrase you may include all losses which may happen during a voyage by a fortuitous accident. I think that in *Cullen* v. *Butler* (1) Lord Ellenborough distinctly stated that the general phrase could not be made so large, but must, in an English policy, be confined to perils of the like kind with those enumerated. It is necessary, in considering decisions at law, always to exercise the imagination to a certain extent, to imagine cases which may happen. I can myself imagine many cases which would come within the definition of losses which happen at sea by a fortuitous

(1) 5 M. & S. 461.

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accident, but to my mind would not be recoverable either under the particular terms or the general phrase of an ordinary English policy. Suppose for instance that there were an insurance on casks of spirits, and by negligence of the crew (which would be a fortuitous accident) or by some accident happening on board the ship itself, one or more of the casks were staved, and the spirits lost. I can see nothing in the ordinary English policy which could cover such a loss. Suppose again a ship were to sail from the West Indies with a perishable cargo, and the captain and crew were so prostrated by disease that the ship could not proceed on her voyage, and by reason of the delay so caused the perishable articles perished. There is, it seems to me, nothing in an English policy which would cover such a loss. Therefore I should be unable at present to agree to the large definition contended for.

The Lord Chief Justice suggested a definition which coming from him of course required great consideration; he suggested that the general phrase would cover all those things, without exposure to the risk of which navigation cannot take place. If it were necessary to define so far, I should be unable to agree to so large a definition, which would cover the two cases which I have imagined. I think that Lord Ellenborough, one of the greatest masters of this head of law who ever administered justice in England, put a limitation in *Cullen* v. *Butler* (1), and I think that Lord Tenterden did the same, both admitting the limitation to other perils not of the same kind, but of the like kind with one of those enumerated. The passage cited from Emerigon was in all probability correct as to many foreign policies, and correct with regard to the general view of underwriters at the time at which he wrote, but it is not applicable to an ordinary English policy, except so far as it may shew that, subject to the limitations of Lord Ellenborough and Lord Tenterden, you may give the general phrase as large a construction as you reasonably can.

Now unless the word "fire" had been one of the particular terms in this policy, I could not have seen that the loss by explosion was like any of the other perils which are enumerated. It has given me considerable difficulty to bring my mind even to suppose that this loss is so far like a loss by fire as to enable us to

(1) 5 M. & S. 461.

say that it comes within the general words; but on consideration I think that there is sufficient similarity. An explosion by gas very often ends in fire, and a fire under the deck of a ship very often leads to that which is very like an explosion; whether by rarefying the air or by some other process, the result is that the deck is blown up. There is a sufficient similarity between a fire and an explosion by steam to enable us to give a large construction to the general phrase. I think therefore upon the construction of the policy that a loss by steam explosion is a loss insured against.

The next point in the case is, that assuming a loss by explosion to be within the policy, yet the loss cannot be alleged as against the underwriters for other reasons. It was first said that the loss was caused by the infirmity of the boiler, and that the boiler was a part of the subject-matter insured. It becomes necessary therefore for a moment to consider what is the actual loss in respect of which these assured are endeavouring to recover. They have, as it seems to me rightly, not claimed a loss in respect of the boiler itself, because if all that had happened had been a discovery of the state of the boiler without any actual explosion, they could not have recovered for the cost of the repair.

What they seek to recover, therefore, is the damage sustained to the ship, not by reason of the infirmity of the boiler, but by reason of the explosion. This damage would not have happened without the introduction of steam into the boiler, although such introduction did not necessarily cause it, and it seems to me that the explosion was the proximate cause of the loss, and the only cause to be considered in insurance law.

But it was alleged that the explosion was caused by the infirmity of the boiler resulting from the negligence of the crew. This argument contains the two propositions, that although the proximate cause of loss is by a peril insured against, yet, if that proximate cause is the result of either the negligence of the crew, or of the unseaworthiness of the ship or a part of it, so that without such negligence and without such unseaworthiness, the causa proxima would not have happened, that is a defence for underwriters. With regard to negligence, this has been so frequently overruled that I need not further allude to it. With regard to

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unseaworthiness, Lord Blackburn, J., in trying *Dudgeon* v. *Pembroke* (1) left questions to the jury, which if answered in a particular way would have raised the point. The jury did not answer the questions as he anticipated they would, but the case was argued, even up to the House of Lords, upon the hypothesis that the jury had answered those questions. The point, therefore, was distinctly raised, and in the result there is to my mind a clear decision of the House of Lords that the proposition is untenable, and that though the proximate cause of loss, being a cause within the policy, is the result of the unseaworthiness of the subject-matter insured or part of it, to the extent that the proximate cause of loss would not have occurred but for the unseaworthiness, nevertheless that is no answer, and only the proximate cause is to be considered.

But it was further urged that this loss was the result of mere wear and tear. Now as the loss affected nearly the whole of the ship, even if the boiler had become disabled to the extent it was by mere wear and tear, I should have thought that *Dudgeon* v. *Pembroke* (2) decides that wear and tear cannot be taken into consideration, but it is not necessary to determine that point, because I think it clear beyond all doubt, upon the evidence, that the damage to this boiler was not mere wear and tear, but that the infirmity of the boiler was hastened either by negligent want of attention or by inadvertent want of attention. For these reasons I agree entirely with the judgment which has been given by my Lord.

Judgment affirmed.

Solicitors for plaintiffs: *Waltons, Bubb & Walton.*
Solicitors for defendants: *Freshfields & Williams.*

(1) Law Rep. 9 Q. B. at p. 591. (2) 2 App. Cas. 284.

[IN THE COURT OF APPEAL.]

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HAMLYN *v.* BETTELEY.

(C. A.)
Ex. D.

*Practice—Interpleader Issue—Jurisdiction of Judge to try without Jury—*1 *&* 2 *Wm.* 4, *c.* 58—*Order I., rule* 2—*Order XXXVI., rules* 2 *&* 3.

An interpleader issue cannot be tried by a judge without a jury in pursuance of a notice of that mode of trial, under Order XXXVI., rules 2 and 3.

APPEAL from the judgment of Kelly, C.B., on the trial of an interpleader issue without a jury.

The issue was to try whether certain stock-in-trade, furniture, and effects, seized by the sheriff of Essex under an execution at the suit of the defendant, were the property of the plaintiff, who claimed under a bill of sale as against the defendant. The issue was in common form, concluding as follows:—

"And it has been ordered by Master Dodgson, pursuant to the statutes in that behalf, that the truth of the matter aforesaid shall be tried by a jury at the next assizes for Essex.

"Therefore let a jury come, &c."

The order of Master Dodgson was also in common form, directing "that the parties do proceed to the trial of an issue of the High Court of Justice, Common Pleas Division, in which the said claimant shall be the plaintiff," &c., and "that such issue shall be prepared and delivered to the plaintiff within seven days, and shall be tried at the next assizes for Essex," but not expressly requiring the issue to be tried by a jury.

At a former trial, Denman, J., had directed a jury to find for the defendant, but the plaintiff having obtained a new trial on the ground of misdirection (1), gave notice of trial under Order XXXVI., rule 3, before a judge. No counter notice for trial by any other mode of trial was given on behalf of the defendant. When the issue came on to be tried before Kelly, C.B., the defendant's counsel protested that a judge had no jurisdiction to try it without a jury, but did not withdraw or offer to withdraw from the conduct of the case. The learned judge overruled the objection,

(1) See 5 C. P. D. 327.

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and the case having been tried out, gave judgment for the plaintiff.

Murphy, Q.C., and *Witt*, for the defendant. Prior to the Judicature Act, a judge would have had no power to try an interpleader issue without a jury, and the effect of s. 100 of the Judicature Act, 1873, and of the Rules of the Supreme Court (1) is to preserve the old practice intact. The old procedure is regulated by 1 & 2 Wm. 4, c. 58, s. 1, which directs that in cases of interpleader the Court may order the third party to make himself defendant in the same or some other action, "or to proceed to trial upon one or more feigned issue or issues," &c. The procedure by way of feigned issues was superseded by the procedure prescribed by 8 & 9 Vict. c. 109, s. 19, but that section and the form of issue in the second schedule to that Act, which concludes, "Now let a jury, &c.," shew plainly that trial by jury was the only recognised mode of trying the "interpleader issue" before the Judicature Acts. The exceptions under 23 & 24 Vict. c. 126, for summary determination of trifling disputes, and for stating a special case on a question of law, are only exceptions which prove the rule. The issue concluding "therefore let a jury come," becomes a part of the order that "such issue be tried at the assizes," and the parties were bound by the order to try by jury.

Willis, Q.C., and *Edward Pollock*, for the plaintiff. The defendant by going on with the trial waived the irregularity: *Andrews* v. *Elliott*. (2)

(1) By Order I., rule 2, "with respect to interpleader, the procedure and practice now used by courts of common law, under the Interpleader Acts, 1 & 2 Wm. 4, c. 58, and 23 & 24 Vict. c. 126, shall apply to all actions and all the divisions of the High Court of Justice, and the application by a defendant shall be made at any time after being served with a writ of summons and before delivering a defence."

By Order XXXVI., rule 2, "actions shall be tried and heard either before a judge . . . . . or before a judge and jury" . . . . . and by Rule 3 of the same order "the plaintiff may . . . . . give notice of trial of the action, and thereby specify one of the modes mentioned in Rule 2."

By s. 100 of the Judicature Act, 1873 (applied to the Rules of Court by Order LXIII.), "'action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court."

(2) 6 E. & B. 338; 25 L. J. (Q.B.) 336; affirming S. C. 5 E. & B. 502; 25 L. J. (Q.B.) 1. 2 Smith L.C. 663 1 Smith L.C. 1646

[BRETT, L.J. In that case there was distinct consent; here the defendant's counsel protested.]

The point was one which went to the whole conduct of the case; and a mere protest was not enough. At any rate there was a waiver by not giving a counter-notice.

[LORD SELBORNE, L.C. How could that be if the Rules of Court do not apply? If the rules do not apply, you suffered no prejudice by the absence of a counter-notice.]

The Rules of Court apply to interpleader in all its stages after the first, and Order I., rule 2, was inserted, merely for the purpose of giving the Chancery Division jurisdiction in the matter. The words in the issue "therefore let the jury come," may be rejected; the order itself does not direct a trial by jury. There is a precedent for the trial of an interpleader issue by a judge alone: *McAndrew* v. *Barker*. (1)

Murphy, Q.C., in reply. In *McAndrew* v. *Barker* (1) the jurisdiction of Jessel, M.R., to try without a jury was not contested.

LORD SELBORNE, L.C. I entertain some regret that the parties should have to try this case again, but I see no escape from the conclusion that they must do so. I will first say that I think that the point as to waiver is quite untenable. Even in arbitrations, where a protest is made against jurisdiction, the party protesting is not bound to retire; he may go through the whole case, subject to the protest he has made. In the present case, the amount of protest was quite sufficient, and the other side were not prejudiced in the least.

The question we have to determine is, was the notice to try the issue before a judge competently given? It is not necessary to decide whether an action of interpleader—which has been substituted for the bill of interpleader—might be tried without a jury, or whether a judge might have power under Order XXXVI., rule 26, to direct that mode of trial. In the present case, the interpleader proceeding was strictly statutory, being a proceeding under the Interpleader Act (1 & 2 Wm. 4, c. 58), and a judge would have jurisdiction to conduct the proceeding in a proper manner, and we must inquire what that proper manner is.

(1) 7 Ch. D. 701.

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Now what had the Court done? It had made what I will call the "common interpleader order," directing the issue to be delivered in proper time to be tried at the next assizes. In accordance with that order, an issue was drawn up in these terms. [The Lord Chancellor read the issue.] This proceeds upon no erroneous construction of the order, and is to be read with the order.

Order I., rule 2, in providing that "with respect to interpleader, the procedure and practice now used by Courts of Common Law under the Interpleader Acts shall apply to all actions and all Divisions of the High Court of Justice," must be taken to mean that, if no provision be made to the contrary, the practice in interpleader is to retain all the incidents it had before the Judicature Acts, and one of these incidents was a trial by jury. As to the question whether any provision is made to the contrary, so as to give either party a right to vary the mode of trial, I think that must be answered in the negative. Order XXXVI., rule 3, relates to quite a different thing, its words plainly referring to an action properly so called, and not including interpleader, which is not an action either in the strict or in any conventional sense. Sect. 100 defines an action as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court." I find no Rule of Court prescribing the commencement of interpleader proceedings in any other manner. On the contrary, interpleader is treated by Order I., rule 2, as a proceeding in an action, and not as an action itself. The original direction therefore in the issue stands. The judge at the trial had no power to depart from it, and in departing from it has caused a mistrial. The appeal therefore must be allowed.

LORD COLERIDGE, C.J., and BRETT, L.J., concurred.

Appeal allowed: Order for new trial.

Solicitors for plaintiff: *F. Evans & Eagles.*
Solicitors for defendant: *S. Betteley & Co.*

SMITH *v.* THE PARKSIDE MINING COMPANY. 1880 Dec. 10. Ex. D.

Practice—Award—Time for Setting Aside—Notice of Motion—9 & 10 Wm. 3, c. 15, s. 2.

An action having been referred to arbitration the award was published on the 14th of July. On the 24th of November (being the last day but one of the old Michaelmas Term) the defendants moved the Court to set aside the award, but the Court refused the application on the ground that notice of motion had not been given to the plaintiff as required by Order LIII., rules 3 & 4. The defendants afterwards on the same day served on the plaintiff a notice that on the 27th of November they would move the Court to set aside the award:—

Held, on the authority of *In re Corporation of Huddersfield and Jacomb* (Law Rep. 17 Eq. 476; 10 Ch. 92), that the service of notice of motion on the 24th of November was a complaint made in the Court before the last day of the next term after the publication of the award within 9 & 10 Wm. 3, c. 15, s. 2, although no affidavit was filed before the last day, as had been done in that case.

APPLICATION to set aside an award on the ground that it was not final and conclusive. The action having been referred to arbitration the arbitrators and umpire published their award on the 14th of July, 1880. On the 24th of November following the defendants moved the Divisional Court to set aside the award, but the application was refused on the ground that no notice of motion had been given to the plaintiff as required by Order LIII., rr. 3 and 4. Afterwards, on the same day, the defendants served on the plaintiff notice of their intention to move on the 27th of November to set aside the award.

Sir J. Holker, Q.C. (*Myburgh*, with him), for the defendants, moved accordingly.

Sir F. Herschell, Q.C., S.G. (*Crompton*, with him), for the plaintiff, took the preliminary objection that the motion was out of time, the last day for making it being the 24th of November, the last day but one of the term next after the publication of the award; it having been decided that though terms were abolished by the Judicature Act, 1873, s. 26, they still subsist with reference to the time limited by statute for moving to set aside awards. (1)

Sir J. Holker, Q.C. There are two answers to this objection. First, the application to the Court on the 24th of November

(1) *College of Christ* v. *Martin*, 3 Q. B. D. 16.

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was a complaint within s. 2 of 9 & 10 Wm. 3, c. 15. (1) The refusal on the ground that notice had not been given does not make the application less a "complaint made in the Court." It complies literally with the words of the statute. Secondly, the service of the notice of motion was a complaint within the statute. In *In re Corporation of Huddersfield and Jacomb* (2) a notice of motion for the 25th of November was served on the 20th and an affidavit in support of the motion was filed in Court on the 20th. It was held by Malins, V.C., and affirmed by the Lords Justices that 9 & 10 Wm. 3, c. 15, s. 2, had been complied with. The service of the notice of motion was a proceeding in the cause and in the Court, for if no motion had been made in pursuance of the notice the plaintiff would have been entitled to move the Court to dismiss the application and to give him his costs. In that case Malins, V.C., said (3): "Surely the complaint began when a notice of the objection was given to the other party which brought both parties before the Court. I think, therefore, that notice of motion was enough." In affirming the decision, James, L.J., said (4): "I think that the notice of motion and the filing of an affidavit in support of it constituted the commencement of a complaint in this Court within the meaning of the Act. Perjury might have been assigned on the affidavit, and if the motion had been abandoned costs might have been recovered by the respondent."

Sir F. Herschell, S.G., in reply. As to the first answer, an application to the Court which is made in time, but which is abortive because not made in compliance with the Rules of Court, cannot turn a subsequent application which is too late into a valid application. As to the second answer, the service of a notice of motion is not "made in the Court" or to the Court, and it is a proceeding of which the Court at the time has no cognizance and may never

(1) Sect. 2 enacts "that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of law or equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the next term after such arbitration or umpirage made and published to the parties, anything in this Act contained to the contrary notwithstanding."

(2) Law Rep. 17 Eq. 476; 10 Ch. 92.

(3) Law Rep. 17 Eq. at p. 485.

(4) Law Rep. 10 Ch. at p. 94.

have cognizance. The decision of *In re Corporation of Huddersfield and Jacomb* (1) has no application, for no affidavit was filed in the present case before the last day of term. If the mere service of a notice is enough the actual complaint may be deferred indefinitely by naming a distant day for moving.

HAWKINS, J. I think we ought to hear this motion. To the objection that it is out of time two answers are made: first, that a complaint was made in time, because an application was made to the Court on the 24th of November, and that though the Court refused it on the ground that notice of motion had not been given to the plaintiff, yet the application was itself a complaint in the Court within the statute 9 & 10 Wm. 3, c. 15, s. 2. The second answer is that, even assuming that that application was not a complaint within the Act, yet since notice of motion was given on the 24th of November of the intention to make the motion, the Act has been complied with, and for that reliance is placed on *In re Corporation of Huddersfield and Jacomb*. (1) There is just this difference between that case and the present, that in that case, in addition to the service of the notice of motion, an affidavit was filed in support of it. But, in my opinion, the filing of the affidavit made no substantial difference, the decision in that case really being rested on the service of the notice of motion. In deference to that authority, I think we ought to treat the service of the notice of motion on the 24th of November as a complaint made in the Court within the statute. I think we are not at liberty to overrule the decision of Malins, V.C., affirmed, as it was, by the Lords Justices, though no doubt James, L.J., does rest his decision partly on the filing of the affidavit.

But, for my own part, I do not attach so little importance to the first answer as the Solicitor-General does. I am not prepared to say that an application to the Court would not be a complaint within the Act, although notice of motion had not been given. But it is not necessary to decide that question.

STEPHEN, J. I am of the same opinion. It must be understood that we base our judgment on the decision of Malins, V.C., upheld,

(1) Law Rep. 17 Eq. 476; 10 Ch. 92.

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as it was, by the Lords Justices. I have a difficulty in distinguishing that case from the present. Upon the other answer to the objection I give no opinion whatever.

The motion was then heard on the merits, and the Court made an order referring the award back to the arbitrators.

Solicitors for plaintiff: *Helder, Roberts, & Gillett.*
Solicitors for defendants: *Gregory, Rowcliffes, & Co.*

Dec. 10.

C. P. D.

COTTAM, APPELLANT; GUEST, RESPONDENT.

Tramways—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 54—*User of Wheels substantially flanged.*

Sect. 54 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), prohibits the user of the tramway by unlicensed persons with carriages "having flange-wheels or other wheels suitable only to run on the rail of such tramway."

The appellant, an omnibus proprietor, attached to his vehicle a lever with arms having a small revolving disc or roller which the driver might drop into the groove of the rail at the lower side of each fore-wheel when on the tramway, such discs operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever leaving the vehicle free to travel over any part of the road:—

Held, that this contrivance (though no obstruction to the tramway) was within the prohibition of the statute.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information was laid before the stipendiary magistrate for the borough of Salford by Robert Guest against Thomas Cottam, alleging that Cottam on the 9th of June, 1880, at the borough of Salford did unlawfully use part of a tramway laid along Bolton Road, to wit, the part of a tramway laid along the said Bolton Road from the Woolpack Inn to Irlams o'th'Height, with a carriage having wheels suitable only to run on the rail of such tramway, he the said Thomas Cottam not being impowered to use the said part of the said tramway under any lease from or by agreement with the promoters of the said tramway, or under any licence from the Board of Trade, contrary to the statute, &c.

The charge against Cottam arose under the statute 33 & 34 Vict. c. 78, called The Tramway Act, 1870, s. 54, which provides

that, "if any person, except under a lease from or agreement with the promoters, or under licence from the Board of Trade as by this Act provided, uses a tramway or any part thereof with carriages having flange-wheels or other wheels suitable only to run on the rail of such tramway, such person shall for every such offence be liable to a penalty not exceeding 20*l*."

Upon the hearing of the information and the evidence and arguments which each of the parties had to lay before them, it appeared to the justices, and it was admitted by the defendant, that he did use part of the tramway with a carriage, that is to say, an omnibus, without being impowered to use the tramway under any lease from or by agreement with the promoters of the tramway, or under any licence from the Board of Trade; and it was also proved that the omnibus so used by the defendant was borne upon and moved entirely by four ordinary wheels, which wheels were suitable to run not only upon the tramway but were also suitable to run and to bear and move the omnibus upon all parts of the public highway: and it was also proved that the omnibus was furnished with two small circular revolving discs, wheels, or rollers in connection with the front or fore wheels of the omnibus, and used for the purpose of guiding the aforesaid ordinary bearing wheels thereof upon the metals of the tramway by running in the groove or recess of the tramrail, but capable of being instantly lifted therefrom at any moment by means of a lever under the control of the driver, and would then roll upon other part of the highway, and so leaving the wheels of the omnibus free to quit the metal of the tramway at any instant. It was further proved that the omnibus in so using as aforesaid the rail of the tramway did not necessarily cause any obstacle or hindrance to the ordinary tramcar or any other vehicle using the tramway. It was also proved that the omnibus was in no respect borne or moved by the said revolving discs, wheels, or rollers, and that, save as aforesaid, the discs, wheels, or rollers did not assist in the traction of the vehicle, or perform any function whatsoever of ordinary wheels.

It was contended on behalf of Cottam that the said discs, wheels, or rollers were not wheels within the meaning of the statute; and that, if they were, they were suitable not only to

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run on the rail of the tramway but also elsewhere upon other parts of the highway; and that all the wheels of the omnibus (including the said discs, wheels, or rollers) were suitable not only to run on the tramway but elsewhere on the highway.

The justices, however, were of opinion that in law the aforesaid revolving discs, wheels, or rollers applied and used as aforesaid were wheels suitable only to run upon the tramway, which was the ground of their determination in the case; and they therefore convicted Cottam in the penalty of 40*s.* and costs.

The question for the opinion of the Court was whether the said revolving discs, wheels, or rollers applied and used as aforesaid were wheels within the meaning of the Act suitable only to run on the rail of the tramway. If the opinion of the Court should be in the affirmative, the conviction was to stand; otherwise, to be quashed.

Mellor, Q.C. (*Channell*, with him), for the appellant. That which the appellant is charged with having done is not a violation of either the words or the spirit of s. 54 of the Tramways Act, 1870. He does not use "flange-wheels," that is, wheels having a flange all round the edge of the tire. His wheels are those ordinarily used for bearing omnibuses or other carriages. The thing complained of is a small circular revolving disc placed against the lower part of the inner side of each of the two fore-wheels upon which the vehicle travels, for the mere purpose of steadying it in its progress along the rails of the tramway. Neither are the wheels with the discs "suitable *only* to run on the rails of such tramway;" for, the revolving discs being by the application of the lever withdrawn from the groove in the rails, the wheels are capable of running over the other parts of the roadway; the vehicle then remaining an omnibus of the ordinary character and construction. In no sense, therefore, can these wheels be said to be wheels of the description the use of which was intended to be prohibited by the Act. It is not found in the case that the tram-cars were or could be at all impeded by the use of this contrivance. The 62nd section of the Act enacts that "nothing in this Act or in any bye-law made under this Act shall take away or abridge the right of the public to pass along or across every or any part of any road

along or across which any tramway is laid, whether on or off the tramway, with carriages not having flange-wheels or wheels suitable only to run on the rail of the said tramway." The appellant, therefore, has done nothing more than exercise the right which the legislature has reserved to every subject of the realm.

Sir F. Herschell, S.G. (*Smyly*, with him), contrà. The wheels used by the appellants plus the revolving discs are for all practical purposes "flange-wheels" within the meaning of s. 54. The object of the Act was to encourage the formation of tramways; and that of s. 54 was to prohibit the use of any contrivance to turn the tramway from its legitimate use,—to prevent the owners of other vehicles to do more than they could do with wheels of the ordinary construction: and there is nothing in s. 62 to relax that prohibition. By s. 19 the proprietors are impowered to lease the tramway when formed, or to take tolls for its use. The wheels with the revolving discs are for all practical purposes "flange-wheels or wheels suitable only to run on the rail of the tramway." The disc is a mere contrivance to enable the appellant to use the rails without the payment of any toll or recompense to the owners or lessees. His omnibus with that appliance is in effect an improved tram-car.

DENMAN, J. I am of opinion that the decision of the magistrates in this case was right, and that the conviction must be affirmed. The 54th section of the Act upon which the proceedings were taken enacts that, "if any person, except under a lease from or agreement with the promoters, or under licence from the Board of Trade as by this Act provided, uses a tramway or any part thereof with carriages having flange-wheels or other wheels suitable only to run on the rail of such tramway, such person shall for every such offence be liable to a penalty not exceeding 20*l.*" Now, we have seen a model of the vehicle used by the appellant; and it appears to me to be properly described thus:—It runs upon four wheels of the ordinary construction; but against the two fore wheels is placed a revolving disc which when let down by means of a lever drops into the groove of the rail and performs the same functions as a flange attached to the tire of the wheels. It appears

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to me upon three grounds the conviction was right. In the first place, when the omnibus is running along the tramway with the disc down, the tramway is being used by a carriage having flange-wheels, that is, wheels flanged at the time the carriage is so used. That is the common sense of the thing; for, even though the disc is only a temporary flange, still, if it is at the time of the use a thing performing the office of a flange, that makes it a flange-wheel; and I should be content to affirm the conviction upon that ground only. In the next place, I do not think the question whether the wheels are suitable or can be used for other purposes than for running upon the rail, is at all material. When the disc is let down, the wheels are turned into wheels which are suitable only for running upon the rail of the tramway, and cease to be ordinary wheels; and at that time the penalty is incurred. A third ground upon which the statute may be said to be violated is this, that the discs themselves are wheels and are properly so described, and when they are used the bearing wheels are suitable only for running on the tramway. Upon every ground, therefore, it appears to me that the conviction was right, and must be affirmed with costs.

LINDLEY, J. I am of the same opinion. My impression is that the argument of Mr. Mellor is too narrow. The object of the enactment in question appears to me to have been to prevent the lessee of the tramway from having his rails used by a rival. This is a very ingenious contrivance to evade the statute. The words of s. 54, "carriages having flange-wheels or other wheels suitable only to run on the rail," point to this, viz. the user of the tramway with a flange-wheel or with a wheel so constructed as to enable the driver of the vehicle to make an unfair and colorable use of the tramway. That construction is fortified by the 62nd section, which does not authorize the public to use the tramway at all, but to use the road notwithstanding the tramway may be constructed upon it. It was never meant to enable the public to use the tramway as a tramway in opposition to the promoters or their lessees. The omnibus of the respondent may be aptly described as an improved tram-car. The use of the disc renders the wheel substantially a flange-wheel at the point of contact, or it is a

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colorable contrivance to enable the vehicle to run upon the rail, in derogation of the privilege granted to the lessee. I think the appeal should be dismissed with costs.

Mellor, Q.C., asked leave to appeal. He urged that the question was of vital importance to the appellant, inasmuch as he had obtained a patent for his invention.

DENMAN, J. I think it is against the spirit of the enactment (1) which gives us the power to allow an appeal in these cases, to accede to such an application where we can entertain no doubt as to the correctness of the decision.

Appeal dismissed with costs.

Solicitors for appellant: *Milne, Riddle, & Mellor, for W. Duckworth, Manchester.*

Solicitors for respondent: *Bower & Cotton, for W. A. Synde, Manchester.*

[IN THE COURT OF APPEAL.]

Nov. 24.

SMITH *v.* COWELL.

(C. A.) Q. B. D.

Practice—Judgment Creditor—Elegit—Equity of Redemption—Application for Receiver—Interlocutory Order—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

The words "interlocutory order" in s. 25, sub-s. 8 of the Judicature Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after.

A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver:—

Held, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose.

THIS was an action on a bill of exchange brought in the Queen's Bench Division. The plaintiff recovered judgment, and sued out a writ of elegit. The defendant had no goods or legal

(1) Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45.

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estate in lands, but was entitled to an equity of redemption of certain freehold and leasehold property. With the view of obtaining equitable execution of his judgment against such equity of redemption, the plaintiff applied to a judge at chambers under Order LII., rule 4, for the appointment of a receiver. The judge refused to make the order, on the ground that he had no jurisdiction to make it upon an application in the original action after judgment recovered. An appeal from that refusal to the Queen's Bench Division having been dismissed, the plaintiff appealed to the Court of Appeal.

Willis Bund, for the plaintiff. The question is whether a receiver can be appointed upon an application made in the original action after judgment, or whether it is necessary to commence a new action for the purpose in accordance with the old practice of the Court of Chancery. The circuitous process of the old Chancery practice is rendered unnecessary by s. 25, sub-s. 8 of the Judicature Act, 1873. The words "interlocutory order" there are wide enough to include an order made after judgment. This point was raised in *Anglo-Italian Bank* v. *Davies* (1) but not decided. Jessel, M.R., however, expressed a strong opinion that a fresh action was unnecessary.

Robert Williams, for the defendant. Under s. 25 of the Judicature Act, the appointment of a receiver is to be only by "interlocutory order," but an order is interlocutory only if made at some time between writ and final judgment. Here judgment had already been pronounced at the time of the application made; a new action therefore is necessary as a foundation for the order asked. There is nothing in the section giving any new mode of getting execution of an equitable estate by way of receiver.

BAGGALLAY, L.J. This motion raises a question of considerable practical importance, and one which, so far as I am aware, has not been hitherto decided. In this case the plaintiff has recovered judgment and sued out a writ of elegit, but the defendant has no property to which resort can be had to satisfy that judgment,

(1) 9 Ch. D. 275.

except an equity of redemption. Now if this case had arisen before the Judicature Act, the plaintiff's course would have been clear; he would have had to file a bill in Chancery, claiming to have it declared that by virtue of his judgment he was entitled to a charge upon the defendant's equity of redemption to the amount of such judgment; and then, upon an application for a receiver being made in the course of such suit, a receiver would have been appointed. He has here, however, applied to the Queen's Bench Division for a receiver, without commencing any fresh action. The question is whether a fresh action is necessary. Section 25, sub-s. 8 of the Judicature Act, 1873, provides that "a mandamus or injunction may be granted, or a receiver appointed by an interlocutory order of the Court," in all cases in which it shall appear just and convenient; and the defendant's contention is that the Court has no power under that section to make an order for a receiver in an action after judgment, for that the words "interlocutory order" mean an order prior to final judgment. But with that contention I cannot agree. The interpretation of the word "interlocutory," as used in that sub-section, is to be found later on in the sub-section itself, which provides that "if an injunction is asked either before, or at, or after the hearing of a cause," it may be granted, &c. But it is only by an interlocutory order that the Court has power under this section to grant an injunction. In the case of an injunction therefore, the section clearly contemplates an interlocutory order being made after the hearing of a cause, or in other words, after judgment. But if the word interlocutory is to have that extended meaning in the case of an injunction, why not also in the case of a receiver? In my opinion, the plaintiff was right in making this application to the Queen's Bench Division in the way he did. It is true he might have made it in the course of a second action instituted for the purpose: *Anglo-Italian Bank* v. *Davies* (1), but that is a circuitous process which I consider no longer necessary.

BRETT, L.J. This is an application for an order to appoint a receiver made in an action after judgment. The question is whether the Queen's Bench Division has power on such an

(1) 9 Ch. D. 275.

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application to make such an order. Now before the Judicature Act, neither the Court of Queen's Bench nor the Court of Chancery could have made the order asked for on such an application as this. Then has the Judicature Act given the Court such a power? The question depends on s. 25, sub-s. 8. (His Lordship read the sub-section.) Those words are very wide, and give to all the divisions a larger power than the Court of Chancery possessed before. The power there given is of the largest kind, unless it is circumscribed in point of time by the words "interlocutory order." But it is said that interlocutory must mean something between action begun and final judgment. I cannot agree. In my opinion, "interlocutory order" there means an order other than a final judgment or decree in an action.

COTTON, L.J. I am of opinion that the plaintiff is entitled to a receiver. Before the Judicature Act a judgment creditor in a similar position could have enforced his judgment only in the Court of Chancery, and then only by means of an independent proceeding taken for the purpose of enforcing it.

All the common law divisions have now under s. 24, power to give the same relief which the Court of Chancery could have given before. But that is not enough for the purpose of the present case, for here no independent proceeding was taken. Then is there anything in the Act giving the Court a wider power than that which the Court of Chancery possessed?

Section 25, sub-s. 8, provides that "a mandamus or an injunction may be granted, or a receiver appointed in all cases in which it shall appear to the Court to be just and convenient." In my opinion it is just and convenient to enforce the plaintiff's judgment, by giving him equitable execution where he cannot by reason of the legal impediment of the outstanding mortgage get legal execution at the hands of the sheriff. But then the defendant argues that the Court, when granting this relief, is entitled to grant it only by means of an interlocutory order, and that the order here asked for is not interlocutory, judgment having already been pronounced. But the section itself shews that the words "interlocutory order" are not there used in that sense. In the earlier part of the section those words are applied equally to the

appointment of a receiver and the granting of an injunction; while the latter part of the section speaks of an injunction being granted after judgment as well as before. I think those words must be taken to mean an order other than an order made by way of final judgment at the hearing of a cause.

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Appeal allowed.

Solicitors for plaintiff: *Paddison, Son, & Titley.*
Solicitor for defendant: *Alfred Barnard.*

[CROWN CASE RESERVED.]

Dec. 4.

C. C. R.

THE QUEEN *v.* SALMON, HANCOCK, AND SALMON.

Manslaughter—Death caused by dangerous Act performed without proper Precautions—Fire-arms, negligent use of—Joint Wrong-doers.

A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards.

No precautions of any kind were taken to prevent danger from such firing.

One of the shots thus fired by one, though it was not proved by which one, of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing point. A., B., and C. were all found guilty by a jury of manslaughter:—

Held by the Court (Lord Coleridge, C.J., Field, Lopes, Stephen, and Williams, JJ.), that A., B., and C. had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter.

CASE stated by Lord Coleridge, C.J.

The three prisoners were tried before me on the 27th of July, 1880, for the manslaughter of William Wells, a little boy of ten years old under the following circumstances:—

George Salmon is a member of the Frome Selwood Rifle Corps. On the 29th of May he attended the rifle practice. He took his rifle from the armoury; had fourteen ball cartridges served out to him and fired them all away. After the practice was over he took away with him his rifle; which it was his duty to return to the armoury. He did not take it back, and the drill instructor

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missed six cartridges from the magazine when he went there about half an hour after the practice was over.

About seven o'clock, that is shortly after the practice was over, the three prisoners came together to the house of a witness (Newport), who was called, and whose evidence so far as it is material to the point to be determined was as follows:

"The three prisoners came to my father's house somewhere about seven in the evening on the 29th of May. George Salmon had a rifle with him and some ball cartridges. All three wanted to fire off one or two shots; and they asked me for something to fire at. I gave them a board from our fowlhouse. I went with them into a field close by; and the prisoner Hancock climbed into a tree. George Salmon handed up the board to him. Hancock fixed it in the tree about eight feet from the ground. They all went about 100 yards up the field; and all lay down in the grass. I heard two shots. I cannot tell which of them fired the shots, for I was looking at the board. I am not sure whether the first shot struck the target; the second shot did strike it. I do not know which of them fired it. Two more shots were fired afterwards, when Wells and Knight came running up and told us what had happened.

The place where the shot was fired, and all the surrounding houses and roads, are correctly delineated in a plan which was proved before me and marked by me at the time. To that plan I beg leave to refer the Court, as conveying a clearer view of the place and its surroundings than any statement of mine could convey.

"What had happened," to use the words of the witness Newport, was this: The deceased, William Wells, was with his young sister in his father's garden, and her evidence was as follows:—

"I remember the evening of the 29th of May. There is a low apple tree in my father's garden with a rose tree in it. My brother got up into the apple tree to water the rose; while my brother was in the tree I heard a shot; it passed through the tree, for some of the leaves fell down from the tree. I called to my brother, but he answered me, and said he was safe. Then there was another shot, and my brother fell out of the tree dead on the

ground. There were four or five shots fired altogether, I think; the second shot killed him."

It was proved that the distance from the spot where the shot was fired to the tree in which the boy was killed was 393 yards; but the rifle was sighted for 950 yards, and would probably be deadly at a mile.

The evidence of conversations after the death had been caused, as to the person who fired the shot, was as follows:—

Joseph Wells, the father of the little boy, the first person who came to the prisoners after the shot, said, "When I first came up I saw Hancock and Newport and John Salmon. I told them what had been done, and that they had killed my boy. They seemed very sorry, and wished they had not done it. I asked them where the rifle was. They said it was flung down in the field; but we could not find it. I left Hancock and John Salmon in charge of Knight."

Jonathan Knight said, "I saw the three prisoners with Newport in the field. I called to them to stop firing. I came on Hancock and Newport and John Salmon. I saw George Salmon at first, but he was not there when I came up. I told them they had killed a boy; and I said, 'Where is the gun?' They went back to find it, and could not, and said that George must have taken it away."

William Parsons said, "I went to Newport's house. There I saw Hancock and John Salmon. I went with them to the field, and they shewed me the tree in which was the target. The bottom of the target was about ten feet from the ground. I took John Salmon and Hancock to the police station. Then I went to George Salmon's. He said when I took him into custody, 'Don't blame my brother, for it was I that did it.' I took him to the station; when the three were together there George Salmon said, 'I fired the shot.' Hancock said, 'Yes, we all three fired one each.' George said, 'I fired the first shot, and it must have been I that killed the poor boy.'"

The rifle was afterwards found in George Salmon's house, and it and two cartridges found in the field were identified by the drill instructor, the rifle as being the rifle George Salmon ought to

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have been returned to the armoury on the evening of the 29th of May, the cartridges as cartridges similar in all respect to those, six of which he had missed from the armoury on that evening.

The jury found all the prisoners guilty of manslaughter, but I allowed them to go out on bail till I could take the opinion of the Court of Criminal Appeal on the case.

I am to request the opinion of the Court whether there was any evidence upon which either or all of the prisoners could be convicted of manslaughter.

No counsel appeared for the prisoners.

Norris, for the prosecution. The prisoner who fired the fatal shot was guilty of such wicked or culpable negligence as amounts to manslaughter; the other two were joint actors with him; they went to the field for a common purpose which was, as they knew, highly dangerous in the absence of proper precautions. No precautions were taken, they failed in that which is a public duty, to take reasonable precaution to prevent danger to others from the firing of the rifle. The plan of the spot shews that they fired across no less than three highways, and that they were in close proximity to, and fired in the direction of, the garden where the boy who was killed was.

LORD COLERIDGE, C.J. The conviction must be affirmed. If a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter.

It was manslaughter in him who killed the boy. The death resulted from the action of the three, and they are all liable.

FIELD, J. I am of the same opinion. I had some doubt as to whether there was any duty owed by the prisoners to the particular boy, but it seems to me that there is a general duty to the public, of which the prisoners committed a breach. They had a duty not to use a weapon likely to cause death or injury in an improper

place and without taking proper precautions to avoid injury. The evidence shews that that duty was not observed. The character of the place and the probability of persons being about was such that I am satisfied the conviction was right.

LOPES, J., concurred.

STEPHEN, J. I am of the same opinion. Manslaughter is unlawful homicide not amounting to murder. It is unlawful where caused by the culpable omission to discharge a duty tending to the preservation of life. There is a duty tending to the preservation of life to take proper precautions in the use of dangerous weapons or things. It is the legal duty of every one who does any act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it. Firing a rifle under circumstances such as in the present case was a highly dangerous act, and all are responsible, for they unite to fire at the spot in question, and they all omit to take any precautions whatever to prevent danger.

WILLIAMS, J., concurred.

Conviction affirmed.

Solicitors for prosecution: *Cruttwell, Daniel, & Cruttwell, Frome.*

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Nov. 20.

(C. A.)
C. P. D.

[IN THE COURT OF APPEAL.]

LUCAS *v.* DICKER.

*Bankruptcy — Notice of act of Bankruptcy—Notice of Petition —Execution Creditor—*32 & 33 *Vict. c.* 71, *s.* 95, *sub-s.* 3.

A notice to an execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71, s. 95, sub-s. 3, since such creditor ought to know that the petition would contain a statement that the debtor has committed an act of bankruptcy :—

So *held*, affirming the decision of the Common Pleas Division.

Hocking v. *Acraman* (12 M. & W. 170) commented on.

APPEAL from the judgment of the Common Pleas Division in favour of the plaintiff (1), where the special case containing the facts is fully set forth.

It is only necessary to state here that on the 17th of April, 1879, certain goods of Lord Charles Ker, against whom the defendant in the present action had obtained judgment, were seized in execution under such judgment at the instance of the defendant. Before the goods were sold by the sheriff the defendant received the following written notice :—

"18, Old Burlington Street,
"London, W., 6 May, 1879.

"In the High Court of Justice,
"Common Pleas Division.

"*Dicker* v. *Lord C. J. Innes Ker.*

"Take notice that a petition in bankruptcy was on the 23rd of April last filed in the county court of Berks, holden at Windsor, by John Rigby and Thomas Gullick against the above-named debtor, and the hearing thereof is fixed for the 10th of May instant, at 11 A.M., and take notice that a second petition in bankruptcy was on the 1st of May instant also filed in the last mentioned court by Walter Thornhill and Henry Nimrod Walker,

(1) 5 C. P. D. 150.

and that the hearing thereof is appointed for the 17th of May instant, at eleven, also at the said county court at Windsor.—Yours, &c., "Thomas A. G. Powell,

"Solicitor for the said Lord Charles J. I. Ker."

The execution debtor was adjudicated bankrupt on one of these petitions, the act of bankruptcy having been committed on the 31st of March, 1879. The plaintiff was afterwards appointed trustee in bankruptcy, and the question was whether this notice of the 6th of May was a sufficient notice of an act of bankruptcy to deprive the defendant, the execution creditor, of the benefit of s. 95, sub-s. 3 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which protects "any execution or attachment against the goods of any bankrupt executed in good faith by seizure and sale before the date of the order of adjudication, if the person on whose account such execution or attachment was issued had not at the time of the same being executed by seizure and sale notice of any act of bankruptcy committed by the bankrupt, and available against him for adjudication."

Sir John Holker, Q.C., and *G. Pitt-Lewis*, for the defendant. The notice was not sufficient to deprive the execution creditor of the protection given by the 3rd sub-section of the 95th section of the Bankruptcy Act. The Court below considered that notice that a petition in bankruptcy had been filed was notice of an act of bankruptcy, because such petition to be effectual must be founded on an act of bankruptcy, but the act of bankruptcy might in this case have been after the seizure, and the creditor who has to act with promptitude ought to be able to know from the notice when the act of bankruptcy was, and whether it was or not before the seizure.

[LORD SELBORNE, L.C. The section says "seizure and sale," so the time to be looked at is not the seizure; besides the section does not say that the notice must state when the act of bankruptcy was committed.]

The cases of *Ex parte Todhunter* (1), *Ex parte Schulte* (2), and *Edwards* v. *Scarsbrook* (3), shew that the act of bankruptcy must

(1) Law Rep. 10 Eq. 425. (2) Law Rep. 9 Ch. 409.
(3) 32 L. J. (N.S.) (Q.B.) 45.

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be prior to the seizure in order to defeat the title of the execution creditor, and if so the notice should be such as to enable the creditor to know from it whether the act of bankruptcy was or not before the seizure. The notice here, however, was not necessarily notice of any act of bankruptcy at all. It amounts at most to a statement that the person who filed the petition thought that there had been an act of bankruptcy—and this is not sufficient. To satisfy the enactment there should at least be a specific notice of an act of bankruptcy. The cases of *Udal* v. *Walton* (1) and *Hope* v. *Meek* (2), referred to by the Court below, were different from the present case, as in those there was notice of an act of bankruptcy, though it was only a general notice. *Bird* v. *Bass* (3) and *Turner* v. *Hardcastle* (4) do not support the plaintiff's contention. The case which is in point is *Hocking* v. *Acraman*. (5) There the execution creditor received notice that a docket had been struck against the debtor, and that was held not to be notice of an act of bankruptcy. That case is attempted to be distinguished by Pollock, C.B., in *Udal* v. *Walton* (1) by saying "notice of a docket having been struck merely informs the party that another person has taken a certain step which is adverse to the debtor; the commercial world gather nothing from that fact except that some person has made a certain affidavit."

Hocking v. *Acraman* (5) cannot be distinguished in principle from the present case. *Conway* v. *Nall* (6) and *Evans* v. *Hallam* (7) shew that the information given by the notice in this case is not sufficient.

A. Wills, Q.C., and *Graham*, for the plaintiff.

[LORD SELBORNE, L.C. You need not argue the point whether a general notice without stating the nature of the act of bankruptcy, or at what time it was committed, would be sufficient, and you may confine yourself to the question whether notice that a petition in bankruptcy had been presented would afford sufficient notice that an act of bankruptcy had been committed by the person against whom it was presented.]

(1) 14 M. & W. 254; 14 L. J. (Ex.) 262.
(2) 10 Ex. 829; 25 L. J. (Ex.) 11.
(3) 6 Man. & G. 143.
(4) 11 C. B. (N.S.) 683; 31 L. J. (C.P.) 193.
(5) 12 M. & W. 170; 13 L.J. (Ex.) 34.
(6) 1 C. B. 643; 14 L. J. (C.P.) 165.
(7) Law Rep. 6 Q. B. 713.

On looking to the form of the petition given in form No. 10 in the general rules made under the Bankruptcy Act, 1869, it will be seen that there is this allegation, viz., "That the said A. B. has committed an act [or acts] of bankruptcy within six months before the presentation of this petition. That the act [or acts] of bankruptcy committed by him was or were that [here set out separately the acts of bankruptcy]." Therefore a notice of such a petition having been filed does import that some one has said that an act of bankruptcy has been committed by the debtor against whom such petition has been filed.

[BRETT, L.J. What do you say to the case of *Hocking v. Acraman?* (1)]

That it is wrong, and so the Court afterwards thought in *Udal* v. *Walton*. (2) At least the reasoning given in it is wrong. When a docket was struck there must have been an allegation that an act of bankruptcy had been committed. In the note by Mr. Christian to 2 Black. Com. 15th ed. p. 480, he says, "When a creditor intends to take out a commission he must make an affidavit of his debt and execute a bond to the Great Seal (this is called *striking a docket*)." The form of the affidavit is in the 2nd vol. of Cooke's Bankrupt Laws (8th ed.), published in 1823, p. 1, in which there is the statement that the debtor "is become a bankrupt within the true intent and meaning of some or one of the statutes made and now in force concerning bankrupts, as this deponent has been informed and believes." It is immaterial how the fact that there has been an act of bankruptcy is brought home to the creditor. This cannot be better put than in the following language of Lord Wenleysdale in *Hope* v. *Meek* (3), viz., "When an act of bankruptcy has been in fact committed, any communication which brings to the knowledge of the execution creditor before the sale the alleged fact that an act of bankruptcy has been committed in a way which ought to induce him, as a reasonable man, to believe that the notification was true, is, in our judgment, a sufficient notice."

Sir John Holker, Q.C., replied.

(1) 12 M. & W. 170; 13 L. J. (Ex.) 34.

(2) 14 M. & W. 254; 14 L. J. (Ex.) 262.

(3) 10 Ex. 829; 25 L. J. (Ex.) 11.

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LORD SELBORNE, L.C. We all think that this appeal should be dismissed. The Bankruptcy Act, 1869, requires that, in order to displace the title of the execution creditor, he should have notice of an act of bankruptcy committed by the bankrupt, but it does not require that the notice should be given by any particular person or in any specific manner. If notice of such matter as the statute requires reaches him in any way, that is enough, and it does not signify how it is communicated. It is sufficient if he has such information as would, if true, shew that an act of bankruptcy had been committed, and if that comes to him in any way or from any quarter, whether from one person or another it matters not, his execution is not protected. No doubt, if the information does not amount to notice that an act of bankruptcy has been committed, as was the case in *Evans* v. *Hallam* (1) it is insufficient. Now in the present case the information was given direct to the execution creditor, and it was that two petitions in bankruptcy had been presented against the debtor, and that they were standing for hearing at the county court at Windsor, and the real question is whether a person receiving such information is to be treated as having notice of those things which are required to be stated in such a petition under the bankrupt law. It seems to me to be only reasonable that he should be so treated. He must be taken to be acquainted with the bankrupt law of which he is claiming the benefit, and therefore to know that such a petition ought to contain one or more definite statements that the debtor has committed an act of bankruptcy. If no adjudication takes place on any such act of bankruptcy, he is not damnified by the notice, but knowledge of such a petition being filed is knowledge of an act of bankruptcy. If the defendant had gone to the proper court and read the petition, he would have had knowledge of the act of bankruptcy, and as this notice informs him that two persons had petitioned that the debtor should be adjudicated a bankrupt, and as such adjudication could only be if there were allegations in the petitions of an act of bankruptcy and they were true, the inference I draw is that the notice gives all the necessary information to make it notice of an act of bankruptcy. Without going into the cases which have been referred to of *Ex parte*

(1) Law Rep. 6 Q. B. 713.

Schulte (1) and *Ex parte Todhunter* (2), it is sufficient to say that I can find nothing in the clause in the statute which requires the notice to reach the creditor in such a form as to tell him what was the act of bankruptcy which has been committed. It only remains now to see how far our decision is consistent with the authorities. It is consistent with all of them except the case of *Hocking* v. *Acraman* (3), and whether it can be reconciled with that or not, it is unnecessary for us now to inquire, for however much we may regret doing so, if it cannot be reconciled with this decision we must dissent from that authority; and this we have not the same difficulty in doing as we should have had if it had been shewn that that case had been recognised as an authority and acted on in subsequent cases. I ought however to add that what we have heard on the subject of striking a docket under the old bankruptcy law shews that that case is really not consistent with our present decision.

BAGGALLAY and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitors for plaintiff: *Thomas & G. Powell.*
Solicitor for defendant: *Charles J. Allen.*

MORGAN *v.* REES.

Dec. 2.

Q. B. D.

*Practice—County Court, Appeal from—*38 *&* 39 *Vict, c.* 50, *s.* 6*—Omission to request Judge to take Note—Application to compel Judge to sign Note actually taken.*

The Court will not order a county court judge to sign notes, which he may have taken at a trial, in order that they may be used on appeal under 38 & 39 Vict. c. 50, s. 6, when the judge was not requested to take a note of any specific question of law raised at the trial, and of the facts in relation thereto, in conformity with the above-mentioned section.

Affirmed on appl 6 Q.B.D. 598 C.A.

THIS was an application for an order directing a county court judge to sign the notes which he had taken upon the trial of

(1) Law Rep. 9 Ch. 409. (2) Law Rep. 10 Eq. 425.
(3) 12 M. & W. 170; 13 L. J. (Ex.) 34.

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an action in the county court, in order that they might be used on appeal under 38 & 39 Vict. c. 50, s. 6.

It appeared that upon the trial in the county court, before the case began, the advocate who appeared for the applicant, the party now desiring to appeal, requested the county court judge to take notes, but did not specify any point of law with regard to which such notes were to be taken. The judge did take certain notes, a copy of which he supplied to the applicant, but he declined to sign the same on the ground that he had not been requested to take notes on any specific points of law, and the notes which he had taken were of an incomplete description and not such as he would have taken if he had been requested to take notes on any specific points of law. A rule nisi having been obtained on behalf of the applicant for an order upon the county court judge to sign the notes,

Cohen, Q.C., and *Tindal Atkinson*, appeared to shew cause. The Court called on

Holl, Q.C., and *Terrell*, in support of the rule. The notes have been in fact taken, and the Court of Appeal in *Seymour* v. *Coulson* (1) held that the provisions of 38 & 39 Vict. c. 50, s. 6, are not conditions precedent to the appeal. If the note exists it does not matter whether there was a request or not. Unless the notes are signed the applicant may be precluded from appealing, because the Court will not take cognizance of the appeal except upon notes properly authenticated by the county court judge. The order of the 22nd of January, 1877, provides that no motion shall be made by way of appeal from any county court judge, unless a copy of the judge's notes signed by the judge shall have been handed to the proper officer in court, unless otherwise ordered.

Cohen, Q.C., and *Tindal Atkinson*, in reply. The Court has no power to compel the judge to sign notes except in pursuance of a statutory duty. The statutory duty can only arise when the requirements of the section are complied with. The section does not say that the judge must sign any notes that happen to be in existence, but only notes that he has been requested to take in

(1) 5 Q. B. D. 359.

conformity with the statute. There is a substantial reason on the judge's part for refusing to sign these notes. Practically speaking, the business of county courts could not be got through if full notes had to be taken in every case. Rough notes taken by the judge for his own guidance might be only misleading upon an appeal. It is therefore essential that the judge's mind should be directed to specific points of law in conformity with the section if the notes are to be used on an appeal. [They cited *Morgan* v. *Davies*. (1)]

LORD COLERIDGE, C.J. I think this rule should be discharged. The application is that the county court judge may be directed to sign his notes of the trial. It seems to me that the only notes which we could have jurisdiction to order the judge to sign are those which he is directed by the statute to take and sign. If the judge had taken such notes in obedience to the statute, we might have jurisdiction to compel him to sign them. That is not this case. Here the judge did take some notes, whether complete or incomplete seems to me immaterial. He allows the party now applying to have a copy of those notes, and it is those which we are asked to compel him to sign. He declines to do so, first, because he was not requested to take notes in conformity with the statute, and, secondly, because the notes taken would mislead the Court on appeal, not being such notes as he would have taken if asked to take notes on some specific point of law. The 38 & 39 Vict. c. 50, s. 6, says, "At the trial the judge, at the request of either party, shall make a note of any question of law raised at such trial and of the facts in evidence in relation thereto, and of his decision, &c., and he shall . . . furnish a copy of such note, or allow a copy to be taken of the same . . . and he shall sign such copy." It appears to me that there is no duty cast on him of signing any notes except such as he has been requested to take with reference to a specified point of law and of the facts in relation thereto. The case of *Seymour* v. *Coulson* (2), which has been referred to, does not touch this point. All the Court decided there was that the requirements of the section are not conditions precedent to the right of appeal. They merely provide the appellant

(1) 3 C. P. D. 260. (2) 5 Q. B. D. 359.

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with a more convenient machinery for appealing. Accordingly the Court held that, in a case where substantially everything that the section required was in existence, where notes had been taken of the points of law and the facts connected therewith, though not at the request of the party, and those notes probably signed, though that is not distinctly stated, the Court could hear the appeal. The Court does not say that where the judge was not requested to take notes in conformity with the Act he can be bound to sign notes that were taken. They only say that it does not signify how the necessary notes came to be furnished, if they were furnished, which seems, if I may presume to say so, a very sensible decision. Here we are called on to enforce a statutory duty, and the question is whether we can enforce it under other conditions than those prescribed by the statute. It does not follow from our decision that any harm will be done. If on the bringing up of the appeal any real disadvantage will accrue to the appellant from the absence of the notes, the Rule of Court provides for that contingency, and the Court may order that the appeal should be heard otherwise than upon notes signed by the judge.

FIELD, J. I am of the same opinion. We can only order the judge to sign such notes as the statute directs him to sign. Those are notes which he has taken at the request of the party of specified points of law, and the facts in relation thereto. Here no request was made that any such notes might be taken. The party does not intimate to the judge that certain points of law will arise, and request him to take notes in relation thereto. The judge did take notes, but he says that they are not such notes as he would have taken if the specific points of law had been brought to his mind. At one time I doubted whether the decision in the Court of Appeal did not conclude us with regard to the present point, but on consideration I do not think that that decision is in point. I agree that these provisions are not conditions precedent to the right of appeal, but I do not think that that touches the present question. I was afraid, if we did not make the rule absolute, the appellant's appeal might be barred. But I do not think that follows. If we think, on the hearing of the appeal,

that we have sufficient information to deal with it without the signed notes, I think we have power to do so. For these reasons I think the rule should be discharged.

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Rule discharged.

Solicitor for applicant: *Griffith Jones.*
Solicitors for county court judge: *Bolton, Robbins, & Busk.*

FRAZER & CO. *v.* CUTHBERTSON.

Dec. 20.
Q. B. D.

Ship — Managing Owner — Entry on Register as — Authority to bind other Owners — Ship's Necessaries.

W. was the registered owner of certain shares in a ship, and had been entered on the register as managing owner. The defendant subsequently became the registered owner of other shares in the ship. The defendant was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without the defendant's knowledge, and contrary to the terms of an agreement made between them. The defendant did not participate in the adventure, and had previously informed W. that he did not intend to navigate the ship or take any part in her management. The plaintiffs supplied necessaries for the ship previous to such voyage, upon the order of W. without the knowledge or consent of the defendant. The plaintiffs, before supplying the goods, consulted the register, and found the defendant's name entered therein as part owner of the ship:—

Held, by Bowen, J., that the fact that the defendant had allowed the entry on the register describing W. as managing owner to remain unaltered did not per se amount to a holding out of W. as his agent, so as to render the defendant liable for the necessaries supplied by the plaintiffs, and that inasmuch as W. had not in fact authority to bind the defendant, the plaintiffs could not recover against the defendant for such necessaries.

FURTHER consideration before Bowen, J. The facts and arguments sufficiently appear from the judgment.

Cave, Q.C., and *McClymont*, for the plaintiffs.
Wills, Q.C., and *J. Edge*, for the defendant.

Cur. adv. vult.

Dec. 20. BOWEN, J. The plaintiffs are ship provision merchants carrying on business at Newport, and the defendant Cuthbertson, at the date of the supply of the goods and stores for which this

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action is brought, was the registered owner of forty sixty-fourth shares in the ship *Coniscliffe*, and at the same date J. H. Watson was registered owner of twenty-four sixty-fourth shares in the same vessel, and was also on the register as managing owner in the manner which I shall presently discuss. The defendant denies that the goods and stores were ordered on his credit, or that he is liable to pay for them, and the question of his liability is the one which I have to decide. The *Coniscliffe* belonged originally to W. H. Watson (the father) and J. H. Watson (the son), who together were in partnership, W. H. Watson being registered as owner of thirty-six shares, and J. H. Watson of eight shares. On the 18th of November, 1875, W. H. Watson was entered on the register as managing owner.

On the 7th of August, 1877, W. H. Watson died, leaving J. H. Watson, his son, and the defendant Cuthbertson his executors. His thirty-six shares were transferred on the register to J. H. Watson who, on the 31st of December, 1877, caused himself to be entered on the register as managing owner, pursuant to the provisions of 39 & 40 Vict. c. 80, s. 36. The entry is as follows:—

"31st December, 1877.

"John Hunter Watson, of 8, Nile Street, Sunderland, is managing owner by letter under his hand dated the 15th of December, 1877, being registered owner of eight shares.

(Signed) "J. Toyster,
Registrar."

The management of the ship after the death of W. H. Watson was left in the hands of J. H. Watson, the defendant Cuthbertson taking no part in it. At the time of the death of W. H. Watson the *Coniscliffe* was at sea, having sailed on the 26th of October, 1876. She returned home on the 30th of April, 1878, and in the ship's husband's books relating to her voyage, kept by J. H. Watson, is a signature of the defendant Cuthbertson as executor of W. H. Watson, dated the 23rd of July, 1878. After the return in April, 1878, the defendant Cuthbertson tried, as executor, to sell her. She was put up to auction without any result on the 13th of May, 1878. On the 27th of May, 1878, it was agreed between the defendant Cuthbertson and J. H. Watson that J. H.

Watson should purchase the thirty-six shares belonging to the testator's estate. The price to be paid by J. H. Watson was 787*l.* 10*s.*, payment to be made by his promissory note given on the 1st of June, 1878. J. H. Watson gave the promissory note as agreed; the note, however, being dishonoured and the money remaining unpaid.

The *Coniscliffe* meanwhile had again gone to sea upon the 3rd of June, 1878, upon a voyage to Venice, remaining still under the management and control of J. H. Watson, with the knowledge of the defendant Cuthbertson who, though a co-executor, was not at this time a registered owner. The ship in this voyage, beginning June, 1878, and ending March, 1879, was not navigated on the defendant Cuthbertson's account, but for J. H. Watson and the then owners. Having agreed for the sale of the vessel to J. H. Watson, the defendant Cuthbertson took no interest in the arrangements for this voyage.

On the 1st of March, 1879, she returned. At this date J. H. Watson still owed money to his father's, the testator's, estate, which he could not pay, and was called on, upon the part of the defendant Cuthbertson, his co-executor, to reduce his indebtedness. To protect his interest a bill of sale was taken by defendant Cuthbertson of thirty-six shares belonging to J. H. Watson, which was entered on the register on the 21st of May, 1879, and four shares were at the same time transferred by another brother to Cuthbertson, leaving the defendant Cuthbertson as registered owner of forty shares in all upon the 21st of May, 1879: J. H. Watson still continuing to hold twenty-four other shares in her. This was the first time that any entry appears on the register of any interest in the ship being held by the defendant Cuthbertson. The memorandum of the 31st of December, 1877, was still left standing in the register.

At the date of the bill of sale and the transfer of April and May, 1879, the defendant Cuthbertson informed J. H. Watson that he, the defendant Cuthbertson, did not intend to navigate the ship, but meant to have her sold. On the 6th day of June a meeting of the executors was held, and a resolution was come to that she should be sold by auction. Later on in the same day a further meeting of the executors took place, at which J. H.

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Watson agreed to purchase the forty shares registered in Cuthbertson's name for 550*l.*, and to pay cash on signing the bill of sale: and it was agreed that the vessel was not to leave port till the cash was paid, and the bill of sale signed: Cuthbertson at the same time informing J. H. Watson that he had no intention of navigating the ship, and would not take any part in her management.

The following entry was thereupon made in the executor's books: "Mr. Watson agreed to buy the shares in the *Coniscliffe* for 550*l.* To pay cash on signing of bill of sale. The vessel not to leave port until cash paid, and bill of sale signed."

The order for the goods and stores for which this action was brought was given by J. H. Watson on the 21st of June without the knowledge of the defendant Cuthbertson. The plaintiffs doubting J. H. Watson's credit, wrote for a copy of the ship's register, and found Cuthbertson's name upon it as registered owner of forty shares, and learned upon inquiry that Cuthbertson was a solvent person. The order was given and accepted on the 21st of June, and the goods of the value of 153*l.* (which it is admitted were necessaries for the ship if she was to sail), were supplied upon the 23rd of June. After their delivery the ship was sent to sea by J. H. Watson without Cuthbertson's knowledge, and in breach of the arrangement made to the contrary on the 6th of June. In the following August J. H. Watson filed his petition in bankruptcy. The plaintiffs subsequently sued the defendant Cuthbertson for the price of the goods and stores: the defendant Cuthbertson up to that time having had no knowledge of the transaction.

It was contended on the part of the plaintiffs that the defendant Cuthbertson was liable as owner of the ship and as a party to the adventure; but that in any event he had held out Watson as managing owner to the world, and was bound by his contracts, made in the employment of the ship. The plaintiffs contended that during the former voyage J. H. Watson had been allowed to navigate the ship by or on behalf of the owners, and that the entry of the 31st of December, 1877, on the register, by which he purported to nominate himself as managing owner, still remained uncancelled after the transfer to Cuthbertson of forty shares upon

the 21st of May, 1879. Of the existence of this entry of the 31st of December, Cuthbertson was, in fact, unaware, unless the above facts amount in law to notice to Cuthbertson of its existence.

I entertain no doubt that the defendant Cuthbertson was not interested in the adventure, and that as a fact the order for the goods was not only not given on his behalf, or with his authority, but without his knowledge or sanction, and in violation of the express bargain between himself and J. H. Watson that the vessel should not be sent to sea. The only serious question as it seems to me is whether the effect of the uncancelled entry of the 31st of December, 1877, was to hold out J. H. Watson to third parties as agent to navigate and manage the ship on behalf of the defendant Cuthbertson from and after the 21st of May, 1879.

The entry of the 31st of December, 1877, was made in pursuance of 39 & 40 Vict. c. 80, s. 36, which is as follows:—

"The name and address of the managing owner for the time being of every British ship, registered at any port or place in the United Kingdom, shall be registered at the Custom House of the ship's port of registry.

"Where there is not a managing owner there shall be so registered the name of the ship's husband, or other person to whom the management of the ship is intrusted by or on behalf of the owner; and any person whose name is so registered, shall, for the purposes of the Merchant Shipping Acts, 1854 to 1876, be under the same obligations, and subject to the same liabilities, as if he were the managing owner.

"If default is made in complying with this section, the owner shall be liable, or if there be more owners than one, each owner shall be liable in proportion to his interest in the ship, to a penalty not exceeding in the whole 100*l.*, each time the ship leaves any port in the United Kingdom."

The law relating to the position and liabilities of registered owners of ships is tolerably clear. Ship-owners to begin with are not necessarily partners. An owner's liability or non-liability for necessaries supplied to a ship depends on the question whether the person who gave the order had his authority to give it. The register no doubt is evidence of ownership of the vessel, and the registered owner, until the contrary is shewn, may be presumed to

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be the employer of those who have the custody of her, and who are engaged in her navigation. But a part owner, whether registered or not, has no power to bind the other owners without their assent. The question in each case is one of fact, whether he has had such authority committed to him, or if this is not in fact the case, whether he has been allowed to hold himself out as armed with such apparent authority. Such being beyond all doubt the general law, what has really to be determined in this case is the question whether, by inadvertently suffering the entry of the 31st of December, 1877, to remain unaltered, the defendant Cuthbertson held out to third parties consulting the register that J. H. Watson was his agent to manage and navigate the ship on his behalf.

I will assume for the purpose of my judgment that third persons consulting the register had a right to consider, as between themselves and all owners upon the register, including of course the defendant, that J. H. Watson was a managing owner within the meaning of the section I have referred to.

The term managing owner, however, is not defined in the Act of Parliament; it is a commercial and not a legal expression. It is perfectly true that a managing owner is a name which frequently and commonly denotes an owner, to whom the other owners have delegated the management of a vessel. But I do not think it follows, as of course, that every single other owner must be taken to have joined in the adventure merely because there is an owner called a managing owner.

Language occurs both in some text books, and in some decided cases, which seems to be based on the assumption that a managing owner is an owner employed by and on behalf of all his brother-owners without exception: see Abbott on Shipping, p. 72, 10th ed.; *Barker* v. *Highley* (1); *Coulthurst* v. *Sweet*. (2) But there is no magic in the term managing owner which creates him a plenipotentiary for those owners whose agent he is not in fact. The writers and judges in the passages and cases, to which I allude, have been discussing the extent of the authority of the person appointed, not the question whether every single owner must be taken to have joined in his appointment. In the two

(1) 15 C. B. (N.S.) 27; 32 L. J. (C.P.) 270. (2) Law Rep. 1 C. P. 649.

cases I have cited, it was assumed, and was no doubt the fact (as it often if not generally must be the fact) that all the owners were partners in the employment of the ship, and assented to the appointment of one managing owner. But an advertisement that A. B. is managing owner of a vessel seems to me to mean no more than that as owner he is intrusted by such of the owners as are interested in the ship's employment to manage her affairs. An entry to a like effect upon the register does nothing further. The 36th section of the Act nowhere creates new agents, new functions, new capacities, nor clothes existing agents with enlarged powers. The section is part of the machinery designed to secure adequate protection for lives and property at sea; and provides with that or a similar object that a certain class of agents when they are appointed shall be registered, so that it may be known who in fact is managing the vessel. A managing owner registered under the Act is no more and no less than a managing owner before the Act. He binds those whose agent he is, he binds nobody besides.

Here J. H. Watson was not in fact the agent of the defendant Cuthbertson, it is not suggested that he was—and I do not think that, by leaving unaltered the entry in the register which described J. H. Watson as managing owner, the defendant Cuthbertson held him out as his managing owner, that is to say, as clothed with authority to bind any owners other than those who had in fact intrusted to him the management of the ship. Judgment must therefore be entered for the defendant with costs.

Judgment for the defendant.

Solicitors for plaintiffs: *J. & E. Scott, for Hodge & Westmacott.*
Solicitors for defendant: *Shum, Crossman, & Co.*

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Nov. 25.
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THE QUEEN *v.* THE JUSTICES OF SURREY.

Poor Law—Appeal against Rate—Reasonable Time for giving Notice of Appeal —Entry of Appeal—Next Sessions—17 Geo. 2, c. 38, s. 4.

A poor rate for the parish of L. was made and allowed on Saturday, the 20th of March, and published on the following day. S. & Son, who are the occupiers of bookstalls at certain railway stations in the parish, were included in the rate. The quarter sessions next after the publication of the rate were held on the 6th of April. A party desirous of appealing against the rate would therefore, if bound by law to bring his appeal to such April sessions, have had to give notice of appeal upon the 22nd of March, the day immediately succeeding that of the publication of the rate, in accordance with the provisions of 12 & 13 Vict. c. 45, s. 1, which requires fourteen clear days' notice to be given to the overseers. S. & Son gave notice of appeal against the rate on the 7th of June for the then next sessions, which were held on the 5th of July. The Court of quarter sessions refused to hear the appeal on the ground that it ought to have been brought to the April sessions:—

Held, that an appellant against a poor rate is entitled to a reasonable time, before giving notice of appeal, to allow of his considering whether he shall appeal, and the grounds on which his appeal shall be based, and that one day is not a reasonable time for that purpose; and that consequently S. & Son were not bound to give notice of appeal for the April sessions.

Held, further, that under the circumstances they were not even bound to enter and respite their appeal at the April sessions.

THE appellants Messrs. W. H. Smith & Son were occupiers of bookstalls at certain railway stations in the parish of Lambeth. The overseers of the parish had never attempted to rate the appellants in respect of such occupation prior to the 20th of February, 1880, when a provisional valuation list was made including such bookstalls. The appellants on the 26th of February gave notice of objections to the provisional list, but the assessment committee disallowed the objections and confirmed the list. No copy of the list so confirmed however was served by the clerk of the assessment committee on the appellants.

The rate, the subject of this appeal, was made on Saturday, the 20th of March, and published on the church doors on the following day, Sunday, the 21st. The quarter sessions next after the last mentioned date were held on the 6th of April. The appellants gave notice of appeal on the 7th of June for the sessions which were then about to be held on the 5th of July. Upon the

appeal coming on for hearing an objection was taken to the jurisdiction of the court of quarter sessions on the ground that the appeal was brought too late; the Court allowed the objection and refused to hear the appeal.

A rule having been obtained calling upon the justices to shew cause why a mandamus should not issue commanding them to enter continuances and hear the appeal,

Nov. 8. *Morgan Howard, Q.C.* (*Archibald*, with him), shewed cause. The appellants ought to have gone to the earlier sessions; they had abundant time to have enabled them to do so. The rate being published on the 21st of March, they would have satisfied the statutory provisions as to notice if they had given their notices on the following day, the 22nd. Requiring them so to do could work no hardship, for they knew some time before the rate was made that they were included in the valuation list, and therefore liable to be rated. But even if they had not sufficient time in which to give the notices, they ought at least to have entered and respited their appeal in April.

Douglas Kingsford (*Prosser*, with him), in support of the rule. Before giving their notices the appellants were entitled to a reasonable time to consider whether they should appeal or not. What is a reasonable time depends on the circumstances of each case. Here Messrs. Smith had no such reasonable time. Up to the time the rate was published they had no reason to anticipate that they would be rated. The rate is to be made on the basis of the valuation list; and there was no valuation list in force, at the time of the making of the rate, in which the appellants' bookstalls were included. Sect. 47, sub-s. 8 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), provides that the provisional valuation list shall have operation only from the date of the service by the clerk of the assessment committee of a copy of such list on the occupier; and no such copy was ever served.

[He cited the following cases: *Liverpool Gas Co.* v. *Everton* (1), *Rex* v. *Essex* (2), and *Rex* v. *Flintshire*. (3)]

Cur. adv. vult.

(1) Law Rep. 6 C. P. 414. (2) 1 B. & A. 210.
(3) 7 T. R. 200.

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Nov. 25. The judgment of the Court (Manisty and Bowen, JJ.), was delivered by

MANISTY, J. This was an application for a mandamus to the justices of Surrey to enter the necessary continuances and hear an appeal against a rate made and allowed on Saturday, the 20th of March, and published on the church doors on Sunday, the 21st of March, in the parish of Lambeth.

The appellants, Messrs. W. H. Smith & Son, are occupiers of bookstalls at railway stations, and their complaint is that they have been rated improperly in respect of those stalls.

The parish of Lambeth has a local Act—50 Geo. 3, c. xix.—but the time for appealing against this rate depends on 17 Geo. 2, c. 38, s. 4, according to which the appeal should be to the next sessions, and upon 12 & 13 Vict. c. 45, s. 1, according to which fourteen clear days' notice of appeal is to be given.

The 6th of April being the day for holding the then next sessions, notice of appeal, to be in time, must have been given upon Monday, the 22nd of March, the rate having been published on Sunday, the 21st.

Notice of appeal was not given until the 7th of June for the then next sessions, which were held upon the 5th of July.

The quarter sessions refused to hear the appeal on the ground that it was too late, and the application now made to us is to compel the sessions to hear it.

The appellants contend that the rate having been published on Sunday, the 21st of March, and the last day for giving notice of appeal for the next sessions being Monday, the 22nd of March, there was no time for them either to consider whether they would appeal against the rate or prepare and give notice of the appeal together with the grounds of it, if they were bound to give notice of appeal for the next sessions; consequently they contend that the April sessions were not the next sessions within the meaning of 17 Geo. 2, c. 38, s. 4.

The respondents, on the other hand, contend that the appellants were not entitled to any time whatever to consider whether they would appeal or not,—that they were bound to give notice of appeal (if at all) on Monday, the 22nd of March, the day after the

rate was published, or that at all events the appeal ought to have been entered for the April sessions.

The question raised was admitted in the argument before us to be as yet unconcluded by any express authority. In order to arrive at a clear view of the matter, we have taken time to examine the decisions relating to appeals against poor rates and also to appeals against removals, the authorities on which latter branch of the law are numerous, and throw considerable light upon the subject-matter of this application. In respect of both classes of appeals the respective statutes which deal with them require that the appeal should be to the "next sessions," and a long series of cases have occurred in the last hundred years which shew that a liberal construction is to be given to these words.

Turning, first, to the law which governs appeals in removal cases, we find that appeals against removal are created and regulated by 13 & 14 Car. 2, c. 12, and 9 Geo. 1, c. 7.

By 13 & 14 Car. 2, c. 12, a power is given to the aggrieved party to appeal to the "next" sessions.

No definition was given in this Act of Parliament of the meaning of the term "next" sessions. Yet it is obvious that the order of removal might be executed so shortly before any sessions as to render it practically impossible to appeal to it. Meanwhile the statute contains no provision whereby any notice is rendered necessary before entering an appeal, or before the actual hearing of it.

The statute of 9 Geo. 1, c. 7, left untouched, in the case of removals, the law as to the "next sessions;" that term still remained to be explained. Nor did the Act prescribe any notice as a preliminary to entry of an appeal. But it enacted that no appeal should be "proceeded with" unless upon reasonable notice to be given to the respondent, the reasonableness of the notice to be judged of by the sessions. If it appeared to the sessions that reasonable notice had not been given, then they were directed to adjourn the appeal till the sessions after.

It is clear that under the above statutes the party aggrieved by an order of removal had an absolute right, however short the interval of time between the grievance complained of and the next actual sessions, at least to enter his appeal. He could not

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force it on to a hearing in default of notice, because it was not, in default of notice, to be "proceeded with;" but if the time was too short to give such notice, he was entitled to have his appeal entered at any rate and respited. The sessions could not refuse him this: *Rex* v. *Gloucestershire.* (1)

Whether, if time to give a reasonable notice before the next sessions was sufficient, he was entitled in the same way to enter his appeal without giving any notice at all and to have it respited, was at one time doubted; *Rex* v. *Yorkshire.* (2) Ultimately it was held, *Rex* v. *Staffordshire* (3), that, even if the appellant had had ample time to give his notice, and had nevertheless refrained from giving it, he still might enter his appeal, leaving it to the justices to respite it on the ground of want of reasonable notice. By this decision the appellant was able, by lying by and abstaining from giving his notice on the one hand, while entering his appeal on the other, to extend considerably the time for "proceeding with" his appeal.

So far we have dealt (in the case of appeals against removal) with the right of the appellant to insist on entering his appeal. His obligation to enter the appeal now remains to be considered.

If the time of the grievance occurred so shortly before the next actual sessions as either, first, to render it practically impossible for the appellant to consider whether he should even enter his appeal at all, or, secondly, to leave no time for him to give the number of days' notice which was necessary according to the practice of the sessions: Was he bound, nevertheless, to enter the appeal which could not possibly be heard; or might he pass the sessions which stood literally next and enter at the sessions following?

The first of these two questions has been answered in a series of cases, beginning with *Rex* v. *Yorkshire.* (2) The order of removal there had been made upon the 22nd of September. The removal of the pauper was on the 5th of October. Hull, the place to which the pauper had been removed, is sixty miles from Northallerton, where on the 6th of October (the very next day) the sessions began. No appeal was entered at that sessions, and on an application to compel the justices to receive an appeal on

(1) 1 Doug. 191. (2) 3 T. R. 150. (3) 7 East, 549.

the January sessions following, the Court made the rule absolute for a mandamus. By "next sessions," said the Court, the statute of Car. II. must have meant "the next possible sessions."

This language was followed and amplified in *Rex* v. *Flintshire*. (1) The order of removal there was dated on the 24th of September, and executed on Monday, the 3rd of October, at 4 P.M., at Leek, which is fifty-four miles from Mold, where on Thursday, the 6th of October, the Flintshire sessions began. It was shewn that the overseer at Mold who conveyed the paupers to Leek could only speak the Welsh language, and that the overseer at Leek who received them could not understand him, and that nearly a week elapsed before the parish of Leek could gain any information respecting the settlement of the paupers. And though the sessions actually began on Thursday, they usually began on Tuesday, and the overseer of Leek might fairly believe that they would begin on the very next day after the execution of the order. The Court of King's Bench held that it was not necessary that the appeal should be entered on the 6th of October. "We ought not," said Lord Kenyon, "to decide hastily against the words of an Act of Parliament, but some reasonable time ought to be given to the parish appealing, to enable them to inquire whether or not it will be proper to enter an appeal."

In *Rex* v. *Essex* (2) a similar view was adopted. There the order for removal was made on Tuesday, the 8th of July, and served at noon on Saturday. The distance between the respondent and appellant parishes was twenty-four miles, and the appellant parish was distant thirty-seven miles from Chelmsford, where on the next Tuesday the sessions opened. The judgment of Lord Ellenborough is as follows: "The statute of Car. II. certainly directs the appeal to be at the next quarter sessions, but that must mean the next practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appeals or not. They are not bound to devote Sunday to such a purpose. They have had only one entire day, i.e., the Monday, to get the necessary information and to consider whether they will appeal or not, and that in my judgment is not sufficient."

(1) 7 T. R. 200. (2) 1 B. & A. 210.

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It follows from the above cases, that the words "next sessions" must be construed so as to afford to the appellant not only an opportunity of entering his appeal, but a reasonable time to consider whether he should enter it or not. But it still might be the case that, even if he had time to decide as to entering it, it was impossible for him (owing to the length of reasonable notice required by the practice of the sessions) to give the requisite notices in time. What was the duty of the appellant under such circumstances? Was he bound at all hazards to enter his appeal, even though owing to the want of notice the case could not be tried? Or might he pass over that sessions as impracticable, and wait till the sessions following?

Different answers at different times were given by the Courts to this question. In *Rex* v. *Herefordshire* (1) the King's Bench held that the proper course under such circumstances was to enter and have the appeal respited. On Friday, the 18th of April, the order was made. It was executed on Saturday, the 19th, and on the Tuesday following, the 22nd, the Easter sessions were held at Hereford, twenty miles distant. The parish, not having appealed at these sessions, the justices of the Midsummer sessions refused to receive the appeal. The following is the judgment of Lord Kenyon, C.J.:—"The words of the Act of Parliament are very strong, and they require the appeal to be made at the sessions next after the grievance. Where indeed an order of removal has been made some time before, and only executed a very short time before the sessions, so that there was no possibility of appealing to those sessions, this Court has interfered by granting a mandamus to compel the justices at the following sessions to receive the appeal, because the words 'next sessions' mean the 'next possible sessions:' *Rex* v. *Justices of Yorkshire*. (2) But this is a very different case; for there were two intervening days after the execution of the order and before the Easter sessions; and if there was not sufficient time before those sessions to give reasonable notice of appeal, the appeal might have been then entered and adjourned according to the statute, 9 Geo. 1, c. 7, s. 8."

That it was the duty of the appellant to enter and respite, even

(1) 3 T. R. 504. (2) 1 Doug. 191.

if there was no time for him to give the notices, provided he had time enough to enter, was also treated as the correct law in *Rex* v. *Buckinghamshire* (1); *Rex* v. *Staffordshire*. (2) But this doctrine has been questioned, and it has been held in later times that it is unnecessary to enter for the purpose of adjournment any case which it is impossible (consistently with the sessions' practice as to notice) to have heard: *Rex* v. *Southampton*. (3)

An entry under such circumstances becomes a mere useless formality: *Rex* v. *Kent* (4); *Rex* v. *Devon* (5); see also per Montague Smith, J., *Liverpool United Gas Co.* v. *Everton*. (6) The case of *Rex* v. *Yorkshire* (7), if the facts are carefully considered, is not inconsistent with this view, and the suggestion to the contrary contained in the judgment is not necessary to the decision.

An appellant cannot, by any conduct on his part, make impracticable the sessions which otherwise are the next practicable sessions: *Reg.* v. *Sussex* (8), *Reg.* v. *Yorkshire* (9), and *Rex* v. *Yorkshire*. (10) But unless the proper notices can be given, and the appeal tried, the better view would seem to be that it is not requisite to go through the ceremony of entering.

It will be seen that the authorities we have examined still leave undecided, in the case of appeals against removals, a point analogous to that which arises in the case before us of an appeal against a rate; namely, what is the law if the execution of an order of removal is sufficiently early to admit of an actual entry of the appeal, and sufficiently early, if acted on forthwith, to allow of the necessary notice being given, but not sufficiently early to give the appellant a reasonable time to consider whether to appeal or submit. Was he bound at least to enter his appeal? Must the term "next sessions" be construed, so as to allow a party aggrieved not merely the number of days requisite for his notices, but in addition a reasonable time to determine whether such notices should be given, by analogy to the decisions which

(1) 3 East, 343.
(2) 7 East, 549.
(3) 6 M. & S. 394.
(4) 8 B. & C. 639.
(5) 8 B. & C. 640.
(6) Law Rep. 6 C. P. 423.
(7) 4 M. & S. 327.
(8) 4 B. & S. 966, at p. 987; 34 L. J. (N.S.) (M.C.) 69.
(9) E. B. & E. 713; 27 L. J. (N.S.) (M.C.) 269.
(10) 3 T. R. 150.

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have held (apart from all question of notice), that he ought to have some time to look about him and determine whether he shall enter his appeal? In the case of *Liverpool United Gas Co.* v. *Everton* (1), it was assumed that the law possibly might be that he ought to have such extra time in addition to the time necessary for his notices; but the point has never been expressly decided. We should be prepared, if necessary, in the case of an appeal against an order of removal to adopt the view that reasonable breathing time, so to speak, must be allowed to the aggrieved party.

We have hitherto, however, dealt only with the law relating to appeals against removals. The present case is one of an appeal against a rate and depends on separate statutes, the history of which is not wholly dissimilar to those we have just examined. All appeals are the creation of statutes, and the right of appeal against a rate begins with 43 Eliz. c. 2, s. 6, by which an appeal against a rate is given to any subsequent quarter sessions. To control this licence of appeal 17 Geo. 2, c. 38, s. 4, was passed which is as follows:—

"And be it further enacted that in case any person or persons shall find him, her, or themselves aggrieved, by any rate or assessment made for the relief of the poor, or shall have any material objection to any person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein, or shall have any material objection to such account aforesaid, or any part thereof, or shall find him, her, or themselves aggrieved by any neglect, act, or thing done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace, it shall and may be lawful for such person or persons in any of the cases aforesaid, giving reasonable notice to the churchwardens or overseers of the poor of the parish, township, or place, to appeal to the next general or quarter sessions of the peace for the county, riding, division, corporation, or franchise, where such parish, township, or place lies; and the justices of the peace there assembled, are hereby authorized and required to receive such appeal, and to hear and finally determine the same; but if it shall appear to the

(1) Law Rep. 6 C. P. 423.

said justices that reasonable notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same; and the said justices may award and order to the party for whom such appeal shall be determined, reasonable costs, in the same manner that they are empowered to do in case of appeals concerning the settlement of poor persons, by an Act made in the 8th and 9th years of King William III., entitled "An Act for supplying some defects in the laws for the relief of the poor of this kingdom."

Several observations arise on this section. In the first place no length of notice is prescribed; the reasonableness of the notice in each case is left to the sessions. In the second place the giving of a reasonable notice is not made by the section (as is sometimes done in other Acts of Parliament) a condition precedent to entering the appeal. An appeal, it has been held may be entered against a rate even if no notice at all be given: *Reg.* v. *Lancashire* (1); *Rex* v. *Wilts.* (2) The justices are bound in such a case to enter and respite it, for "no notice" is the same as "no reasonable notice;" and the Act of 12 & 13 Vict. c. 45, s. 1, which prescribes a fixed notice of fourteen days instead of a reasonable notice, makes no difference, it would seem, in this respect: *Reg.* v. *Eyre.* (3)

However short the time, an appellant against a rate has a right to enter his appeal; and the justices cannot refuse to receive the appeal, though they are at liberty to adjourn it.

But was the appellant bound to enter, merely for the purpose of having the appeal respited, if there was not any time even to consider whether he was justified in appealing or not? By analogy to the law with respect to appeals against removals it would seem that he was not so bound; and it has been decided in the case of appeals against a rate that the appellant may have fair time to determine whether he should enter his appeal. In *Rex* v. *Sussex* (4) the poor rate was allowed on Saturday, the 5th of October, and published on the following day (Sunday). On Tuesday, the 8th of October, the October sessions began. Held

(1) 8 E. & B. 563; 27 L. J. (N.S.) (M.C.) 161.

(2) 8 B. & C. 384.

(3) 6 E. & B. 992; 7 E. & B. 617.

(4) 15 East, 206.

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that they were not the "next sessions," as not being the next practicable sessions at which an effectual appeal could be lodged. Lord Ellenborough, C.J., saying that "if by the late publication of the rate the parties are driven into such a narrow point of time as not to be able to make an effectual appeal at the next sessions, those must be considered the 'next' when such appeal can be made effectually."

It still remains to be considered: First, Whether it is necessary in the case of a rate, to enter the appeal, even if there be not sufficient time for the giving of the notices? Secondly, Whether in addition to the actual number of days fixed by statute for the notices, the appellant, before being driven to enter his appeal, may take a reasonable time to consider whether such notices shall be given?

The first question was not actually decided in *Liverpool Gas Co.* v. *Everton* (1), but the opinion both of Keating, J., and Montague Smith, J., would seem to be that an entry under such circumstances was not necessary.

We are prepared to adopt the opinion that in such a case an entry is a ceremony which may be omitted without infringing on the Act. The next sessions means in our opinion the next sessions on which an effectual trial can be had, and for which proper notices can be given. We prefer the authorities, which in the cases of removal have so held, to the authorities which imply the contrary, see *Rex* v. *Kent* (2), and *Rex* v. *Devon* (3); and we see no reason why a similar interpretation should not be extended to the statutes regulating appeals against a rate.

The second question is also left without any judicial decision. All that was determined in the case of *Liverpool Gas Co.* v. *Everton* (1) is that six days for consideration was, in any case, an unreasonable time, to which the appellant was not entitled.

We are of opinion, however, upon principle, that the appellant against a rate is entitled, before he enters his appeal, or gives his notices, to have some fair and reasonable time to consider his position, and make up his mind whether he shall take the first step towards appealing, by giving the necessary notices prescribed

(1) Law Rep. 6 C. P. 414. (2) 8 B. & C. 639.
(3) 8 B. & C. 640.

by 17 Geo. 2, c. 38, and to consider the grounds on which such appeal is to be based, which grounds by 12 & 13 Vict. c. 45, are to be specified in the notice. On the trial of the appeal he is precluded by the statute from going in the absence of amendment into any other ground of appeal besides those set forth in such notice. Is he to have no time to reflect upon the grounds by which he is to be bound? Or is his only alternative to go through the form of entering an appeal for a sessions at which it cannot be heard?

We see no substantial ground for making a distinction in this respect between the case of appeals against removal and appeals against a rate. It is true that it is even more important in the case of a rate than in the case of a removal, that appeals should be prosecuted promptly, so that the public authorities should not be left in uncertainty whether the rate is to be attacked or not. But the authorities have in their power the means of preventing all possible inconvenience in this respect, by taking care so to publish a rate as to enable all appellants to have breathing time to look about them, and consider and frame their grounds of appeal.

The next actual sessions are not as it seems to us practically possible where there is no time for intelligent and reasonable action as to the notices and grounds of appeal. In adopting this extension of the words of the statute, it seems to us that we are only following and giving effect to the liberal interpretation which has been placed on this and similar Acts of Parliament by authorities ranging over nearly a century.

It remains to be considered whether Messrs. Smith & Son, the present appellants, have had such a reasonable margin of time for the giving of their notices and grounds of appeal as we think the true interpretation of the Act of Parliament requires.

We are of opinion that they had not. On the Sunday the rate was published. The Monday was the last day for the giving of the notices. If Messrs. Smith & Son are entitled to any breathing time after the publication of the rate, we think it would be idle to contend that this one broken day was sufficient to enable any reasonable person to take intelligent action about the notices and grounds of appeal. The fact that Messrs. Smith & Son were aware

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on the 20th of February that their bookstalls were included in the valuation list, and had on the 26th of February given notices of objections to the list which were not successful, does not, we think, make this short space of part of one day sufficient if it be otherwise insufficient.

And we are of opinion accordingly that the rule should be made absolute.

Rule absolute.

Solicitors for appellants: *Rogerson & Ford.*
Solicitor for respondents: *G. W. Barnard.*

Dec. 1.

Q. B. D.

DEBENHAM, APPELLANT; THE METROPOLITAN BOARD OF WORKS, RESPONDENTS.

Metropolitan Building Act, 1855 (18 & 19 *Vict. c.* 122), *Part II., ss.* 73, 97 —*Dangerous Structure—Party Wall—Complaint against one Owner—Expenses incurred by Board of Works—Reasonableness of Charges.*

A structure within the metropolis having been surveyed by the Board of Works under 18 & 19 Vict. c. 122, ss. 69, 73, an order was made by a magistrate for the owner to take down or otherwise secure the party walls. Upon his default the board themselves executed the works and took out a summons against the owner for the expenses incurred:—

Held, first, that upon the hearing of such summons the owner could not object to his being made liable for expenses actually incurred, by merely shewing that they included items which were in excess of the market price of labour and materials at the date of the execution of the works. Secondly, that he could not require that the other owners of the party walls should be summoned in order that the expenses might be distributed among them.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

1. The appellant is owner of premises No. 8, Great Queen Street, Long Acre, Middlesex.

2. In November, 1878, the appellant took down the house then upon the premises with the exception of the west and east party walls respectively separating the premises on the west from premises known as No. 9, Great Queen Steeet, and on the east from premises known as No. 7, Great Queen Street.

3. On the 9th of January, 1879, an order was made by a metropolitan police magistrate that the appellant should take down the party wall on the west side as far as cracked, bulged, or otherwise defective, or otherwise secure the same to the satisfaction of the surveyor appointed by the Metropolitan Board of Works. (1) An order in the like terms, or to the like effect, was at the same time made upon the owner or occupier of No. 9, Great Queen Street.

4. Neither the appellant, nor the owner or occupier last mentioned, having complied with the order, the board subsequently in March, 1879, entered and took down the party wall on the west side.

5. On the 18th of March, 1879, the board by notice in writing required the appellant to underpin, repair, or otherwise secure the east party wall aforesaid as far as loose, decayed, or otherwise defective. Also to shore up the wall with three sets of raking shores immediately. A notice to the like effect was at the same time served by the board upon the owner or occupier of No. 7, Great Queen Street.

6. Neither the appellant, nor the owner or occupier last mentioned, having complied with the notice, the board subsequently, in March, 1879, entered the appellant's premises, No. 8, Great Queen

(1) By 18 & 19 Vict. c. 122, Part II., s. 63: If the owner or occupier to whom notice is given as last aforesaid (i.e., to take down, secure, or repair a dangerous structure), fails to comply with such notice the commissoners (now the Board of Works) may make complaint before a justice of the peace; and it shall be lawful for such justice to order the owner of any such structure to take down, repair, or otherwise secure . . . . such structure, or such part thereof as appears to him to be in a dangerous state, within a time to be fixed by such justice; and in case the same is not taken down, repaired, or otherwise secured within the time so limited, the said commissioners may with all convenient speed cause all, or so much, of such structure as is in a dangerous condition to be taken down, repaired, or otherwise secured, in such manner as may be requisite; and all expenses incurred by the commissioners in respect of any dangerous structure by virtue of this Act shall be paid by the owner of such structure, but without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.

By s. 97: Where it is hereby declared that expenses are to be borne by the owner of any premises (including in the term "owner" the adjoining and building owner respectively), the following rules shall be observed with respect to the payment of such expenses.

(2.) If there are more owners than one every owner shall be liable to contribute to such expenses in proportion to his interest.

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Street, and erected three sets of raking shores against the east party wall.

7. On the 6th of May, 1879, an order was made by another magistrate that the appellant should "take down, underpin, or repair the party wall aforesaid, as far as loose, decayed, or otherwise defective, or otherwise secure the same to the satisfaction of the surveyor appointed by the board."

8. The appellant did not comply with the order in respect of taking down or underpinning, but he repaired the party wall, in so far as loose, decayed, or otherwise defective, and otherwise secured the same to the satisfaction of the surveyor.

9. On the 4th of October the board demanded of the appellant the sum of 55*l.* 19*s.* 6*d.*, in accordance with an account transmitted with the demand. The account consisted amongst others of an item of 14*l.* 8*s.* 2*d.* in respect of expenses incurred in taking down the west party wall, and an item of 37*l.* 12*s.* 4*d.* in respect of expenses incurred in shoring the east party wall.

On the 9th of April, 1880, a summons by the board in respect of the 55*l.* 19*s.* 6*d.*, which the appellant had on demand neglected to pay, was heard before the magistrate who stated the case.

11. Upon the hearing the magistrate was of opinion that he was bound under the Metropolitan Building Act, 1855, to make an order for the full amount claimed by the board, it having been proved that the board had incurred expenses to that amount under a contract which they had entered into for such works, though the contract price was at the time of executing the work aforesaid in excess of the then market price; but he considered that he was not empowered to reduce the amount of the expenses actually incurred by the board under the circumstances above mentioned, and thereupon made an order for the full amount claimed.

12. He further held that he could not, as was contended on the part of the appellant, deduct any sum that might be due by way of contribution from the owners or occupiers of Nos. 7 and 9, neither of such owners or occupiers having been summoned to appear, or having appeared before him, and no evidence having been given to enable him to determine the proportions, if any, which such owners or occupiers ought to contribute.

13. The question for the opinion of the Court was whether the

order for the payment of the amount of 55*l.* 19*s.* 6*d.* was upon the facts stated properly made.

Leadham, for the appellant. First, 18 & 19 Vict. c. 122, s. 97, sub-s. 2, requires that where there are more owners than one, every owner shall be liable to contribute to the expenses, and the magistrate ought to have required the other owners to be summoned, in order that the expenses might be distributed among them. The complaint was defective for not including them. Secondly, the facts shew that the charges were unreasonable, and the appellant had a right to object to them. *Bayley* v. *Wilkinson* (1), where under a similar provision in the Public Health Act, 1848, it was held that there could be no arbitration as to whether the expenses were properly incurred by the board, may be relied on by the respondents; but Willes, J., in his judgment, expressly states that, according to the ordinary rule, "expenses incurred" would mean expenses "reasonably incurred."

Biron, for the respondents, was not heard.

LORD COLERIDGE, C.J. I think the magistrate was right on both points. The first question is whether, in ascertaining the expenses of the board under 18 & 19 Vict. c. 122, he should have awarded a less sum than that claimed, because if there had been no general contract between them and their builder, the work might have been done at a less price. There is nothing to shew that the contract, when entered into by the board, was an unreasonable one, or that, having regard to the price of labour when it was made, it was not effected upon moderate terms. I think, therefore, that the magistrate was bound to make his order for the expenses in question. The second point is whether he ought to have had before him any person other than the owner of the dangerous structure, inasmuch as part of this structure was made up of party walls, in which other persons must necessarily have been interested. I think he was not bound to have such persons before him. The policy of the Act is that dangerous structures should be made safe by shoring them up or pulling them down, as may be necessary; and the only argument for

(1) 33 L. J. (M.C.) 161.

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having any person other than the owner before the magistrate is founded on s. 97, by which it is enacted that, where expenses are to be borne by the owner of the premises, including in the term "owner" the owner of the adjoining building, certain rules shall be followed, by one of which, if there are more owners than one, every owner shall be liable to contribute to such expenses in proportion to his interest. I do not doubt that the different owners of a party wall might be within this section; but I can find nothing in the interpretation clause to shew that before the order is made upon the owner of a dangerous structure all the owners must be brought before the magistrate. Such a construction would defeat the main object of the legislature—that dangerous structures should not cause mischief to the public, but should be summarily dealt with. The appellant must be left to get contribution from his co-owners.

FIELD, J., concurred.

Judgment for the respondents.

Solicitor for appellant: *T. G. Bullen.*
Solicitor for respondents: *R. Ward.*

Dec. 1.

(C. A.)
C. P. D.

[IN THE COURT OF APPEAL.]

CARTER *v.* STUBBS.

Practice—Order dismissing Action for want of Prosecution — Appeal from Order—Power to enlarge Time—Order LVII., rule 6.

24 Ch D 693

A judge has jurisdiction under Order LVII., rule 6, to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the order has taken effect and the action has therefore become dismissed; and he has also jurisdiction when he has so enlarged the time for appealing to vary or amend the order dismissing the action, and in the exercise of such jurisdiction his discretion is not limited by any fixed or arbitrary rules.

THIS was an action against the defendant, as executrix of the will of her late husband, Thomas Stubbs, deceased, to recover moneys alleged to be due to the plaintiff. In the course of such action the defendant delivered interrogatories for the plaintiff to

answer, and on the 17th of June, 1880, Master Francis made an order ordering that if the answer to the interrogatories was not filed in seven days the action should be dismissed with costs for want of prosecution. The plaintiff swore his affidavit in answer to the interrogatories on the 24th of June, but the same was not filed until the 25th of June, when the seven days limited by the order had expired, and the action was, therefore, at an end. Afterwards, on the 9th of July, Master Gordon made an order that the order of Master Francis of the 17th of June should be rescinded, and that the plaintiff should have a week's further time to deliver notice of trial. The defendant took out a judge's summons to have the said order of Master Gordon discharged, which came before Hawkins, J., who adjourned the same to the 4th of November, and in meantime, namely, on the 20th of July, made two orders, by the first of which he ordered that the time for appealing against the said order of Master Francis, of the 17th of June, should be extended till the 17th of August, and by the other he ordered that such order of Master Francis should be varied by substituting fourteen days for seven days as the time limited for the plaintiff's filing his affidavit in answer to the interrogatories. The defendant appealed, and on the hearing of the appeal the Common Pleas Division set aside the order of Master Gordon of the 9th of July, but affirmed the two orders of Hawkins, J., of the 20th of July.

Gould, for the defendant, moved to set aside so much of the order of the Common Pleas Division as directed that the two orders of Hawkins, J., should be affirmed. The learned judge had no jurisdiction to make those orders, as, after the seven days had expired, limited by the order of Master Francis for answering the interrogatories, the action was dead: *Whistler* v. *Hancock* (1); *Wallis* v. *Hepburn* (2); *King* v. *Davenport*. (3)

[BRETT, L.J., referred to *Burke* v. *Rooney*. (4)]

That case is distinguishable from the present. There the conduct of the clerk of the defendant's solicitor had raised an equity against the defendant, and there was a mistake in the form of the order dismissing the action, there being two actions, and it being

(1) 3 Q. B. D. 83.
(2) 3 Q. B. D. 84, n.
(3) 4 Q. B. D. 402.
(4) 4 C. P. D. 226.

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doubtful to which the order applied. It is true that Order LVII., rule 6, gives a very extensive power to the Court or judge to enlarge the time, but in this case the Statute of Limitations would apply now if a fresh action were brought, the time limited by it having run out since the action was dismissed by the order of Master Francis, and *Doyle* v. *Kaufman* (1) is an authority that, where the action has become barred by the Statute of Limitations, the Court will not, under Order LVII., rule 6, enlarge the time for renewal of the writ of summons. There are also several cases which shew that the Courts will, in the exercise of their discretion, refuse to enlarge the time for appealing unless the applicant has been misled by the conduct of the other party, which has raised therefore an equity against such other party, or there has been some inevitable accident: *International Financial Society* v. *City of Moscow Gas Company* (2); *McAndrew* v. *Barker* (3); *In re Mansel, Rhodes* v. *Jenkins* (4) and *Blyth* v. *Young*. (5)

Reid, for the plaintiff, was not called upon.

LORD SELBORNE, L.C. On the point of jurisdiction I have no doubt. I cannot find any foundation for the suggestion that Mr. Justice Hawkins had no jurisdiction to make the order of the 20th of July last. The cases of *Whistler* v. *Hancock* (6) and *Wallis* v. *Hepburn* (7) are very different from the present one. In those cases the order dismissing the action was in force and not appealed against, and also there was no application to enlarge the time for appealing, but some other orders were asked to be made for extending the time for doing something in the action, and it was there held rebus existentibus that there was no power to make such orders, as the action was no longer in existence. Those cases have no application here, where the form of the order is for enlargement of the time for appealing against the order dismissing the action, and an order of this kind is within the meaning of Order LVII., rule 6, which expressly says that such enlargement may be ordered after the expiration of the time allowed for doing the act. The contention therefore that the

(1) 3 Q. B. D. 7; on appeal, 3 Q. B. D. 340.
(2) 7 Ch. D. 241.
(3) 7 Ch. D. 701.
(4) 7 Ch. D. 711.
(5) 13 Ch. D. 416.
(6) 3 Q. B. D. 83.
(7) 3 Q. B. D. 84, n.

learned judge had not jurisdiction to make the order is not supported by the cases which have been cited. Then we were referred to cases in which, where the party has allowed the time to pass for appealing from an interlocutory order, the question has been whether there were such special circumstances as would induce the Court to allow the appeal still to be made. One of those cases was where a person postponed applying until the last moment, and then asked to extend the time, when it turned out that he had put a wrong construction on the rule; that was the case of the *International Financial Society* v. *City of Moscow Gas Company* (1), and there it was decided that where a person had so conducted himself and had, by construing the rule erroneously, made a mistake as to the time the Court would not extend the time. In all the cases the Court looked to the surrounding circumstances, but in none of them did the Court mean to lay down a positive rule, or to state absolutely all the kinds of cases in which, and in which only, the discretion of the judge or Court should be exercised to enlarge the time for appealing. Now in the present case the time for appealing against the order expired, but the party against whom the order was made thought he should be able to comply with it in time. I consider that he did so think, because the affidavit was sworn by him within the time limited, but a slip was made in not putting what had been so sworn at once on the file of the Court. Then the proper step to cure this was not promptly taken, but ultimately steps were taken which resulted in the making of these orders of Mr. Justice Hawkins. I do not think that there has been anything here which should induce us to overrule what a learned judge in his discretion has so done, and which has been afterwards affirmed by a Divisional Court.

BAGGALLAY, L.J. I am of the same opinion. As regards the order varying the order of Master Francis as to the time for filing the affidavit I have some doubt whether Mr. Justice Hawkins had jurisdiction to make it, but that is immaterial, provided the other order enlarging the time for appealing can be supported. That depends on Order LVII., rule 6, which states that a Court

(1) 7 Ch. D. 241.

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or judge shall have power to enlarge the time either as fixed by the rules or by any order enlarging the time for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require. Here what was done was to enlarge the time for appealing, and therefore it was an order within the jurisdiction of the judge to make. The rule, moreover, gives in the words I have just read very full discretionary power; indeed, I can hardly imagine a more extended discretion. Then as there was power to make the order which Mr. Justice Hawkins made, there must be some very strong reason, which I do not see existing here, to induce me to overrule the discretion exercised by the learned judge.

BRETT, L.J. The question is whether Mr. Justice Hawkins had jurisdiction to make both the orders he made on the 20th of July last. I think he had, under Order LVII., rule 6. That rule is in the largest terms, and although the time for appealing against the order of Master Francis had expired there was power under that rule to enlarge such time, as was done by the first of these orders. The next order was to enlarge the time for answering the interrogatories, and there was, I think, jurisdiction to make that after the time for appealing had been extended. The cases of *Whistler* v. *Hancock* (1) and *Wallis* v. *Hepburn* (2) were cited to shew that there was no jurisdiction to make these orders; but in those cases it was held that the Court had no jurisdiction to do what they were asked to do, because there had been no order in either of those cases to enlarge the time for appealing against the order dismissing the action, and that order existing and having taken effect the cause was dead. In *Burke* v. *Rooney* (3), however, a different course was pursued, and there application was made by the plaintiff, similar to that which has been made here, to extend the time for appealing against the order, so that he might afterwards get it varied or set aside, and it was held that there was jurisdiction to extend the time. I am clearly of opinion that the decision in that case was right, although *Whistler* v. *Hancock* (1) and *Wallis* v. *Hepburn* (2) were also

(1) 3 Q. B. D. 83. (2) 3 Q. B. D. 84, n.
(3) 4 C. P. D. 226.

rightly decided. Mr. Justice Hawkins had power therefore to make these orders. Then it is contended that if he had such power he exercised it wrongly, and that certain rules have been laid down by the judges in the cases to which we were referred for guiding the exercise of the discretion of the Court, and that in making these orders the learned judge acted contrary to those rules. Now in guiding the exercise of one's discretion, in what frame of mind ought one to approach such a question in a case like the present, where an action in which a considerable sum of money is claimed is to be put an end to because of an accidental slip by a solicitor's clerk? The cases to which we were so referred were cases under Order LVIII., rule 15, and I think it very doubtful if what was said, with regard to the discretion in which the jurisdiction of the Court should be exercised under that rule, would guide us in exercising the discretion given by Order LVII., rule 6, the terms of which are very different from those of Order LVIII., rule 15. There special circumstances are required which are not by Order LVII., rule 6. Moreover, I agree with what the Lord Chancellor has stated as to the immense difficulty of laying down any rule for regulating the mode of exercising the discretionary power of the Court which is to bind judges in all future cases. It is impossible to see and provide for all the special circumstances which may arise in any case. Here what happened was at the judge's chambers, where the strictness of procedure does not exist which prevails in open court. There is often no affidavit produced there, but a statement only by one of the parties who appears before the judge, and which is taken and acted on, and I certainly see no reason for overruling in this case the discretion exercised by a judge at chambers, and which was afterwards affirmed by a Divisional Court.

Appeal dismissed.

Solicitors for plaintiff: *Wild, Browne, & Wild.*
Solicitors for defendant: *Hunters, Gwatkin, & Haynes.*

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Dec. 7.

(C. A.)
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[IN THE COURT OF APPEAL.]

KINGSMAN *v.* KINGSMAN.

Husband and Wife—Articles of Settlement—Infant—Married Woman suing alone—Trust Property—Order XVI., rule 8—Jus tertii.

The plaintiff's husband, who married her when he was an infant of about seventeen, agreed in writing shortly before the marriage, and in consideration of the same, to assign all her property to a trustee for her sole and separate use. At the time of the marriage the plaintiff was possessed of some leasehold property in her own right, and of other leasehold property in trust for her son by a former marriage, and the defendant was her agent appointed by her to receive the rents of the said leasehold property, and as such agent he received the rents both before and after the last marriage. Immediately after the last marriage the plaintiff was deserted by her husband, and she obtained a protection order from a police magistrate, under 20 & 21 Vict. c. 85, s. 21, protecting all her earnings and property acquired since the desertion. The action was brought by the plaintiff alone without her husband (who was still an infant) for the rents received by the defendant after the marriage. The husband made no claim to any of the rents, but the defendant having had notice of the marriage, refused to pay them to the plaintiff; and he applied to stay the action until the plaintiff added a next friend or gave security for costs. This application was refused at chambers, and on appeal by a Divisional Court:—

Held, that the agreement to assign was void as against the infant husband.

Held, also, that the protection order did not apply, but that the effect of the refusal of the Court to stay the action on the defendant's application, was to give leave to the plaintiff to sue alone without her husband, in exercise of the authority given to a Court or judge by Order XVI., rule 8, and which might be so exercised after action brought, and that therefore the plaintiff was entitled to sue alone and to recover the money received from the property of which she was trustee:—

Held, however, by Lord Selborne, L.C., and Baggallay, L.J., that the agreement to assign being void against her husband she could not recover the money received from the property which belonged to her absolutely before her last marriage:—

Held, by Brett, L.J., that she could, since the husband had made no claim, and therefore the defendant, who was not defending by his authority, could not set up the husband's right as an answer to the action.

THIS was an action by a married woman, suing alone in her own name, for certain rents and other monies received by the defendant under a power of attorney which she had given him previously to her marriage with her present husband.

The plaintiff had married twice, and under the will of her first husband she was entitled absolutely to a leasehold house in Alvey

Street, Walworth, and under the same will certain leasehold houses in Mann Street, Walworth, became vested in her in trust for her son by that first marriage. After having appointed the defendant to receive the rents of these houses, she went to New Zealand, where, on the 25th of December, 1875, she was married to William Walter Kingsman, her present husband, a son of the defendant, and who was then an infant of about the age of seventeen. On the day before this last marriage articles of settlement were executed by the plaintiff in her then name of Langlois, and the said William Walter Kingsman, of which the following is a copy:—

"Auckland, 24th December, 1875.

"To Mrs. J. L. Langlois,

"In consideration of your consenting to marry, and marrying me, I undertake, promise, and agree, as soon as the marriage shall have been solemnized between us, to convey and assign to such trustee as you may name the whole of the property now belonging to you, or which hereafter may belong to you, upon such trust as shall secure the same property for your sole and separate use and free from my interference and control, and with an absolute power of disposal on your part.

"J. L. Langlois.

"W. W. Kingsman."

The said William W. Kingsman deserted the plaintiff soon after her said marriage with him, and the plaintiff obtained two orders of protection. The first of these was made in April, 1877, by a resident magistrate in New Zealand, and by it the earnings and property which the plaintiff might thereafter acquire, were ordered to be protected against the said W. W. Kingsman and his creditors, the said order being directed by the magistrate to date from the 25th of December, 1875. The other order was made on the 24th of August, 1878, by one of the Metropolitan magistrates at the Lambeth Police Court, under 20 & 21 Vict. c. 85, and it ordered as follows: "That all earnings and property acquired by" the plaintiff "since the 25th of December, 1875, the time at which the said desertion commenced, or what she may hereafter acquire, and all money and property which she has become possessed of, or to which she has become entitled as executrix,

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administratrix, or trustee, since the commencement of the said desertion, or which she may hereafter become possessed of, or to which she may become entitled as executrix, administratrix, or trustee, shall be protected, and such earnings, money, and property, are hereby protected against the husband and all creditors and persons claiming under him, and shall belong to the said wife."

The present action was commenced in June, 1879, and at that time the said W. W. Kingsman was still under age, and was not within the jurisdiction, and if living was in Australia or New Zealand; but the plaintiff had not seen or heard from him, he had never ratified the said articles of settlement, nor had he claimed any of the monies sought to be recovered in this action. The defendant in his statement of defence admitted that prior to the said second marriage he was appointed the plaintiff's agent to receive the rents of the said leasehold property, and that as such agent prior to and after the second marriage he received certain rents and monies as such agent, but not otherwise, but he denied that he received them after the second marriage on behalf of the plaintiff, and stated that part of them was received by him on behalf of the said W. W. Kingsman, the plaintiff's husband, and that part was received by him on behalf of the said W. W. Kingsman as co-trustee with the plaintiff. He also alleged that the plaintiff being a married woman was unable in law to give him, the defendant, a valid receipt or discharge for the monies claimed in this action.

On the 6th of August, 1879, the defendant took out a master's summons to shew cause "why the plaintiff being a married woman suing without her husband and without a next friend, the proceedings herein should not be stayed until the plaintiff adds a next friend or gives security for the defendant's costs." The Master before whom this summons came refused to make any order, and on appeal, Pollock, B., at chambers, and afterwards the Divisional Court approved of such refusal and dismissed the appeal.

The cause was tried before Lopes, J., during the last Easter Middlesex sittings, when that learned judge being of opinion that the articles of settlement were inoperative, and that therefore as regards the personal property, to which the plaintiff was entitled

absolutely, the same vested in her husband, and that as regards the property of which she was trustee she could not sue without her husband, held that the action failed, and he accordingly gave judgment for the defendant.

The plaintiff appealed to this Court.

Locock Webb, Q.C., and *Wellington Cooper*, for the plaintiff. With respect to the protection orders, the plaintiff relies only on the second one, which was made in England in August, 1878, under 20 & 21 Vict, c. 85, s. 21, and protects all her earnings and property since the 25th of December, 1875, the commencement of the desertion, from which time the order by the Act takes effect.

[LORD SELBORNE, L.C. How can rents from property belonging to the plaintiff before her marriage be earnings or property acquired after the marriage? The order can only apply to property acquired since the marriage either in her own right or as executrix or trustee.]

Then, secondly, the articles bound the infant husband. Though voidable they were not void: *Zouch* v. *Parsons*. (1) In the *Countess of Strathmore* v. *Bowes* (2), Lord Thurlow, L.C., referring to *Slocombe* v. *Glubb* (3), said, "A woman adult about to marry an infant, made a settlement in contemplation of that marriage in which he joined, though an infant, for the purpose of expressing his consent. As it was upon fair consideration, and no fraud to draw him in as an infant, I thought the circumstance of its being fair would bind him, though as an infant not capable of consenting; according to which I held the settlement good as she was capable of conveying."

[LORD SELBORNE, L.C. There he had taken a benefit under the settlement, and he could not reject it in part and accept it in part.]

Nelson v. *Stocker* (4) was relied on by the defendant in the Court below, but that case is very different from the present, as it was sought there to make the infant after he came of age liable for his covenant when an infant to pay a sum of money.

(1) 3 Burr. 1794.
(2) 1 Ves. 22; 1 W. & T. 5th ed. 453.
(3) 2 Bro. C. C. 545.
(4) 4 De G. & J. 458.

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Lastly, the defendant admits that he has received the rents as the plaintiff's agent. The only question then is, whether the plaintiff can sue for them in her own name; Order XVI., rule 8, enables a married woman, with leave of the Court, to sue without her husband or next friend. The Divisional Court expressly refused to stop this action until the plaintiff added a next friend or gave security for costs, and therefore it may be taken that she is now suing alone under such rule 8.

McIntyre, Q.C., and *Oppenheim*, for the defendant. The articles of settlement had no effect as against the husband.

[LORD SELBORNE, L.C. We are all agreed that that document was mere waste paper.]

Then the wife's leasehold property became her husband's after her marriage. The marriage revoked the defendant's authority to receive for the plaintiff, and she was incapable of giving a valid discharge for the rents, and the defendant was liable to pay them to the husband, the person entitled to receive them.

[BRETT, L.J. There is no evidence that the husband ever claimed any of this money, and *Biddle* v. *Bond* (1) seems to me to shew that, where there has been no such claim, the defendant, who has received the money under a contract with the plaintiff, cannot set up the jus tertii.]

The money received after the marriage was received without authority, and that, at all events, which was not the trust money, belonged to the husband, and he only could sue for it. Even as regards the money of which the plaintiff was trustee she could not give a valid discharge for it without joining her husband.

[LORD SELBORNE, L.C. Unless authorized to sue alone.]

The scope of rule 8 of Order XVI., is not to alter the rights of the husband, but only to provide for securing the defendants' costs. The protection orders give her no right to sue alone for any of the money claimed in this action.

[LORD SELBORNE, L.C. We all think that the protection orders do not apply.]

Locock Webb, Q.C., replied.

LORD SELBORNE, L.C. The plaintiff in the first instance seeks

(1) 6 B. & S. 225; S. C. 34 L. J. (N.S.) (Q.B.) 137.

to establish her right to sue by virtue of certain protection orders, but the Court all think that those protection orders do not apply to this case. They are made, at least the one in this country (which was the only one relied on), under an Act of Parliament which simply enables the magistrate to give a right of separate estate to a married woman under certain circumstances as to earnings, or property acquired by her after her marriage. In our opinion there is no such property in question in this case. The next point is the agreement of the husband, who at that time was an infant of the age of seventeen years, or thereabouts, in consideration of the marriage to convey and assign all the then present and future property of the wife for her separate use. I regret that I cannot see the means of giving effect to that agreement, but I find the law on this subject to be, according to authorities with which we are familiar, that generally the promise of an infant is void absolutely as against himself. Of course it follows that no one but himself can take advantage of that law. But to make this agreement effectual as constituting this property the separate estate of the wife, it would, primâ facie, have an effect to the prejudice of the infant husband, and necessarily be an agreement impossible as against him. He remained an infant up to and at the time of this action, and he could not be presumed to have done, nor was it possible for him to have done, anything in the interval to affirm this agreement. Under these circumstances, I apprehend he cannot therefore be treated to have done anything constituting this property in equity, any more than at law, the separate estate of the wife. Consequently the legal effect of the marriage must prevail, which is to vest in the husband the legal right to assign or deal with the wife's leaseholds, and in the meantime to receive the rents.

Those points being thus established, there arise two questions as to the right of the wife to recover anything in this action. The action is brought against a person who admits that, under an agency constituted by the wife before her marriage with her present husband, he has received the rents of the house to which the wife was absolutely entitled at the time of such marriage, and also the rents of other property of which she was a trustee for her infant son by a former marriage. The principles applicable to

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those two descriptions of property are perfectly distinct. I first take the trust property. No doubt the law is that if a woman, being a trustee, marries, the husband does not become her co-trustee, but by reason of the disability of coverture in any action brought by her as such trustee the husband must be joined with her, probably also he must join in any receipt. There are circumstances, however, under which that necessity may be dispensed with. Namely, if he has abjured the realm, or is an outlaw, and this independent of recent legislation; and, then, Order XVI., rule 8, says that "married women may also, by the leave of the Court or a judge, sue or defend without their husbands and without a next friend, on giving such security (if any) for costs as the Court or a judge may require." It would no doubt ordinarily be the proper course to make an application for such leave at the time, or just before the time, of commencing the action; but the Order does not say that the Court shall not have power to give that leave afterwards. That was done so in this case. The plaintiff, the married woman, commenced the action without previous leave. Thereupon the defendant went before the Court and asked that the action might be stopped, unless there was a next friend or security given for costs. In our opinion, upon that proceeding by the defendant, the Court had power to exercise the authority given by Order XVI., rule 8. It did exercise it by refusing the application, and in so doing the Court were of opinion that the case was a proper one in which to permit the married woman to sue alone without a next friend, and without giving security; and, if I may so say respectfully, I am of the same opinion so far as relates to this trust property. That being the case, she has a locus standi in curiam; and I apprehend that for whatever is recovered under a judgment so obtained she can give a valid discharge. Why, then, should she not recover in such an action the amount received by the defendant, of the money of the infant son by a former marriage, of which the wife, and not the second husband, is truly and properly the trustee. It appears to me as clear as any proposition in law or equity possibly can be, that this defendant ought not to be permitted to retain in his hands a farthing of that money, and that that money ought to be recovered

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in this action, and that judgment accordingly should now pass for it.

Then comes the next question, which relates to the Alvey Street property, which was leasehold property belonging absolutely to the wife before marriage. Now, if there had been any balance remaining in the hands of the defendant in respect of the rent of this property received before the marriage, that would have been a chose in action due to the wife at the time of her second marriage, for which, if the husband had afterwards brought an action he ought to have joined the wife as co-plaintiff, and for which, under this Order XVI., rule 8, the wife would be perfectly competent to sue alone. But it appears that the whole amount which had been received before the marriage from that source amounted in the whole to 96*l.* 15*s.* 9*d.*, and that 100*l.* was remitted to the plaintiff in February, 1876, shortly after the marriage and before the defendant could have heard of it, so that nothing is shewn to be due in respect of receipts from the Alvey Street property before the plaintiff's marriage with her present husband.

The question remains as to what was received after that marriage? Now, I own I cannot think that the case as to that is at all analogous to that of *Biddle* v. *Bond* (1), to which reference has been made. The effect of the marriage, setting aside the agreement for a settlement, was to give the husband a legal title just as much in my judgment as if he had been assignee of the leasehold, and the rents subsequently received were his at law, and not otherwise than his in equity. I cannot think (seeing that the agent constituted before the marriage by the wife had notice of the marriage) that the mere fact of the infant husband having made no claim can make any difference. The money was his, and the stake-holder, into whose hands it had got by an authority which was revoked by the marriage, had notice of the marriage and of the person to whom it belonged. If, therefore, there had been an assignment by deed, I am unable to follow the proposition that the defendant, without being liable to pay the money over again to the assignee, could have paid it to the assignor. The case of *Biddle* v. *Bond* (1) seems to me to be essentially different to the present case. There a person who had

(1) 6 B. & S. 225; S. C. 34 L. J. (N.S.) (Q.B.) 137.

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distrained for rent said to be due under an assumed demise, had taken the goods and placed them in the hands of an auctioneer. Nothing occurred afterwards to displace such title or colour of title as he had at the time he put them into the hands of the auctioneer as his agent. The dispute was as to whether the person on whom the distress was made was really his tenant or not, and this related to the antecedent title before the auctioneer became the bailee of the person of whom he received the goods. Though not decided it was considered by the Court there, and I think quite rightly, that as between the bailor and the bailee, the bailee could not set up the jus tertii if the person to whom that right belonged did not set it up himself. Between that case and the case of assignor and assignee I am unable to see any analogy; and although I should have been very glad to have seen my way to a different conclusion, I think the plaintiff must fail as to that part of the claim which relates to the Alvey Street property.

There remains only the question of costs, and in my judgment the whole of the costs of this action from beginning to end ought to be paid by the defendant.

BAGGALLAY, L.J. I am of the same opinion. It appears to me that two questions are involved in the present appeal. The first is whether the plaintiff, who is a married woman, is entitled to sue in her own name in respect of the subject-matter of the action, without joining her husband; and the second is whether the subject-matter of the action, if she is entitled to sue, is such that she is entitled to recover. As regards the first, it appears to me that what took place in the course of the action was sufficient to confer upon her a right to sue without joining her husband, within the meaning of Order XVI., rule 8. There is nothing in that order which makes it essential that leave should be obtained before the action is commenced. At any time during the action the permission can be given, and it can be given either upon security as to costs or not, as the Court think fit. In this case it came before the Court, upon a summons on behalf of the defendant, asking that the plaintiff suing alone should either have a next friend or be responsible for costs. That was refused, and such refusal was confirmed, not only by a judge of first instance,

but by the Exchequer Division. Therefore it appears to me that the right of the plaintiff to sue without the joinder of her husband was established by the order on that summons.

Then, as regards the subject-matter of the action, the case of the plaintiff is based upon three several grounds. Upon the protection order obtained in New Zealand and afterwards at the Lambeth Police Court, upon the agreement for settlement executed the day before the marriage, and, thirdly, upon the nature of the funds forming the subject-matter of the action and how they arose. As regards the protection orders, the plaintiff asserts the moneys so received are the property of the plaintiff within the scope and operation of the protection orders. It appears to me that no portion of the funds forming the subject-matter of this action came within such orders, for all the property the subject of this action was acquired by her before the date of the marriage with her present husband.

Then as regards the agreement for a settlement, it is only necessary to say that at the time the plaintiff's husband signed it he was an infant and never came of full age until after the action commenced. It seems to me impossible to suppose that by any act on his part he could have ratified or confirmed it which could have been held binding upon him after he came of age. The third ground is of a more serious character, namely, the nature of the property and circumstances under which it was received. As regards the Mann Street property, that was held by the plaintiff in trust for her infant son by her first marriage. There was a clear trust, of which this lady was the sole trustee. No doubt after her marriage, if it became necessary to take any proceedings, her husband's name would have to be joined with hers, and probably a receipt would not have been a full and complete discharge unless he joined in it. But by virtue of the order to which I have before referred, which was made on the defendant's summons in these proceedings, she can sue in her own name alone for these moneys, and, as it appears to me, give a receipt for the trust moneys which would be a complete discharge. As regards the remaining part of the property, that is to say, the Alvey Street property, it was given by the testator absolutely to his wife, and therefore on her second marriage it became vested in her

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present husband, and he alone could give a valid receipt for rents received after the date of that marriage. It has been suggested that, because he has made no claim in respect of this property since the marriage, there is something equivalent to an assent on his part that the wife should receive the rents out of it. In my opinion the settlement is in no way binding upon him, and, leaving the settlement out, there is nothing whatever, it appears to me, from which it can be inferred that the husband in any way lost that right which accrued to him on his marriage. The mere absence of an interference on the part of an infant until the action is commenced cannot be sufficient to deprive him of his rights.

As regards the costs, I entirely agree with what the Lord Chancellor has said.

BRETT, L.J. As I very much hope that the litigation in this case will stop here—a litigation which ought never, in my opinion, to have been necessary—I should, unless I thought that the decision in this case might be cited in other cases, have preferred to say nothing in addition; but as I have the misfortune to differ from the judgments which have been given as to the last point, and as that decision may be cited in cases other than this, I think it right to state the grounds upon which, of course with some doubt, I differ as to the last point. I am very sorry, in the first place, we have not had the benefit of the consideration of my Brother Lopes upon the point we have now to consider; but no such point was taken before him, and he had not the opportunity of considering it. I entirely agree with everything the Lord Chancellor has said except upon the last point, that is to say, whether the plaintiff is entitled to recover in respect of the rents received by the defendant from the property which had been hers absolutely before her last marriage.

Now I take it to be clear that the agreement for a settlement was of no effect, and that therefore by marriage this leasehold property became the husband's property and was no longer the property of the wife; but before the marriage the wife had given an authority to the defendant to collect money for her as her agent, and the defendant had accepted that agency. In one sense

that authority ceased upon the marriage, that is to say, he was no longer bound to act as her agent, and she could not have insisted upon his doing so. But I take the fact to be, and it is admitted upon the pleadings, that after the marriage the defendant went on to act and to collect the rent under and by virtue of that authority. He could not properly have collected the rents under any other authority. It is not pretended that he acted upon any authority given by the husband, but he continued to act, and to receive the money, upon the authority given by the wife. He was receiving therefore under a contract between him and the wife money which in fact, I admit, did not belong to her, but belonged to her husband. The wife is allowed to sue here alone, and the first question is, how ought this case to be treated? and it seems to me it should be treated just as if she and her husband were perfectly independent parties. If that be so, it is the case of a plaintiff suing a defendant upon a contract under which he has received money for that plaintiff, with a promise to hand it over to her. What is the defence suggested? It is that the money which the defendant has so collected for the plaintiff does not belong to her but to somebody else, and that the defendant has had notice that that is so, not from the person to whom he says the money belonged, for it is admitted that he has had no claim from him, but notice aliunde that the money does not belong to the plaintiff. The question is, whether the defendant can set up such a defence? In my opinion he cannot. Supposing it was not the case of a husband and wife, but of independent parties, and that in such a case the plaintiff had handed over goods to the defendant upon a contract to return them, in my opinion the defendant could not, merely upon notice aliunde that they were not the plaintiff's goods, say in answer to the plaintiff who had so deposited them with him, "I shall not give them to you because they are not yours, and I know they are not yours." So, as it seems to me, if a plaintiff had desired the defendant to collect money for him, and the defendant after collecting the money, or before—it seems to me immaterial which—had notice aliunde that his employer had no right to the money he, it seems to me, could not upon the mere fact of such notice say to the person who had employed him, "I did not collect the money for you, I collected

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the money for a person who did not employ me." All that is setting up the jus tertii. A case was put by the Lord Chancellor which I have to meet, and I do so with the greatest deference. It was said, if after the plaintiff had employed the defendant to collect rents the plaintiff had assigned the property, the defendant could not then collect the rents under his authority from the plaintiff, and if he paid them to the plaintiff he could not set that payment up as against the assignee? and, if not, might he not say to the plaintiff, "I have had notice you have assigned this property to somebody else?" The proper answer to that case is that if he did say so the plaintiff might reply, "What is that to you? I will settle that with the person to whom it is assigned, but you have no right to set up this jus tertii as against me to whom you contracted to pay the money when you had received it." There are circumstances which will give a defendant a right to set up the jus tertii. They do not, however, consist of the mere fact that he has had notice that the property belongs to somebody else, but that some one else who has the right to claim it has claimed it. That seems to me to have been the case in *Biddle* v. *Bond*. (1) There the defendant employed an auctioneer to sell the goods, one Robbins gave notice that the goods were his, and the Court considered, as it seems to me, that if Robbins had not made a claim, the defendant could have made no answer; but they said that as he had made a claim the defendant might set it up. Mr. Justice Blackburn, who delivered the judgment of the Court, seems to me to put it carefully on the ground of the claim by Robbins, and to have adhered to the rule laid down in former cases that you can only set up this right of a third person if you are defending upon the right and title and by the authority of such third person. In the present case if the wife is to be treated as a distinct person apart from the husband, which I think she is, she is suing the defendant upon a contract he made with her in respect of money collected by him under a promise to give the money to her; and the only answer the defendant puts forward is, not that the husband has claimed the money, but that he has had notice that the plaintiff has a husband and that the money belongs to him. It seems to me that

(1) 6 B. & S. 225; S. C. 34 L. J. (N.S.) (Q.B.) 137.

notice does not alter the case, and that the defendant is not defending this action upon the right and title and with the authority of the husband. Therefore, to my mind, the rules of law would entitle the plaintiff to recover the whole.

Judgment reversed.

Solicitor for plaintiff: *G. Mayor Cooke.*
Solicitors for defendant: *H. F. & E. Chester.*

THE QUEEN *v.* MAYOR, ALDERMEN, AND BURGESSES OF EXETER.

Dec. 21.

Q. B. D.

Municipal Corporation — Constable, Costs of Action for Malicious Prosecution against—Borough Fund and Rates, Illegal Charge upon—Municipal Corporation Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 82.

The chief constable of a borough having, by the direction of borough magistrates, laid an information against a person for conspiracy, an action for malicious prosecution was brought by such person against him and a verdict recovered for 200*l.* :—

Held, that it was not competent to the town council to order payment of the chief constable's costs out of the borough fund or rate under 5 & 6 Wm. 4, c. 76, s. 82.

IN this case a rule nisi had been obtained for a writ of certiorari to bring up a certain order or resolution of the town council of the borough of Exeter, directing payment of the sums of 392*l.* 5*s.* 8*d.*, and 196*l.* 15*s.* 6*d.*, the amount of certain costs, out of the borough fund or borough rates.

The facts of the case were in substance as follows:—

A complaint was made by a woman before the borough magistrates of Exeter that she was unable to obtain payment of certain moneys due to her from a society called the Universal Friendly Society. From what came to the notice of the magistrates at the hearing of this complaint they requested the chief constable of the borough, appointed by the watch committee under the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), to make inquiries and report on the matter. He did accordingly make a report, and by the direction of certain of the borough magistrates laid an information against a man named Hirschfield for conspiring

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with other persons to cheat and defraud. Upon this information a warrant was granted for the arrest of Hirschfield, who was accordingly arrested with two others and brought before the magistrates; but, after several remands, he was discharged on his entering into a recognizance to appear when called upon to answer the offences alleged against him. The other persons arrested were committed for trial, but at the trial were acquitted on the charge of conspiracy. Hirschfield subsequently brought an action against the chief constable for malicious prosecution. The watch committee of the borough instructed the town clerk to defend the action, and their instructions were confirmed by the town council. Upon the trial the verdict was for the plaintiff for 200*l.* damages and costs.

The watch committee passed a resolution that the sum of 392*l.* 5*s.* 8*d.*, the amount of the town clerk's costs of the defence of the action, and the sum of 196*l.* 15*s.* 6*d.*, the taxed costs of the plaintiff in the said action, should be paid out of the borough fund or borough rate. At a meeting of the town council the resolution of the watch committee was affirmed. Pursuant to those resolutions an order was made upon the treasurer ordering him to pay the above-mentioned sums.

Cave, Q.C., and *R. S. Wright*, shewed cause. This order is justified by the 82nd section of 5 & 6 Wm. 4, c. 76. Admitting that the sums ordered to be paid are not within the words "expenses in executing orders of any justice of the peace within such borough," because the justices had no jurisdiction to order the chief constable to prosecute in the sense that any such order was legally binding on him, still they are within the concluding words, "all such charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this Act." [They cited *Reg.* v. *Thompson* (1); *Reg.* v. *Lichfield* (2); *Reg.* v. *Liverpool.* (3)]

Lawrance, Q.C., and *Glen*, supported the rule. [They cited *Reg.* v. *Bridgwater* (4) and *Reg.* v. *Paramore.* (5)]

(1) 4 Q. B. 900, n.; 5 Q. B. 477.
(2) 10 Q. B. 534.
(3) 41 L. J. (Q.B.) 174.
(4) 10 Ad. & E. 281.
(5) 10 Ad. & E. 286.

FIELD, J. (1). The short question is whether it is competent to the town council to make these payments under the 82nd section of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76. The circumstances are as follows:—The chief constable appears to have laid this information at the suggestion of the magistrates, but they had no power to order the chief constable to prosecute Hirchsfield, so as to bind him to do so. The necessary elements of an action for malicious prosecution are absence of reasonable and probable cause, and malice. Here the jury have found malice and have given substantial damages. I must act on that finding and treat it as determined that the damages were given in respect of a personal wrong done by the chief constable, and that he acted with malice. I do not wish to use the word in an offensive sense, but in the sense that he must have acted with undue zeal or feeling, or in some such way brought himself within the legal sense of the term "malice." It is no part of the duty of the chief constable to lay informations, certainly not to do so without reasonable and probable cause, and maliciously. The question is whether, under these circumstances, the case is brought within any of the words of the 82nd section. The first words which were referred to were the words "extraordinary expenses which such persons shall appear to have necessarily incurred in apprehending offenders and executing the orders of any justice of the peace having jurisdiction within such borough." It seems clear that the case is not within those words, because those words obviously apply, not to directions such as those in this case, which the justices may volunteer to give, but to orders of the justices, which they have jurisdiction to make and which are legally binding. Mr. Cave, therefore, very properly admitted that the case could not come within those words, and relied upon the concluding words, "charges and expenses which the watch committee shall, subject to the approbation of the council, direct to be paid for the purposes of the constabulary force under this Act." The purposes of the constabulary force are, however, really defined by the 76th section of the Act. If the matter had been without authority I should have held that these costs could not be within those words. These

(1) The case was heard before Field, J., sitting alone in the Bail Court.

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sums are not paid for the purposes of the constabulary force within the section. Mr. Cave suggested that, though the chief constable did not lay the information in pursuance of an order of the justices properly so called, yet the concluding words must be intended to cover other matters ejusdem generis with, but not covered by, the preceding words; and this information being laid by the direction or at the suggestion of the magistrates, the case was ejusdem generis with expenses incurred in executing the order of a magistrate. But I cannot think that a mere voluntary direction of the magistrate, which it is not the duty of the chief constable to carry out, is ejusdem generis with the order of the magistrate mentioned in the previous part of the section. The cases on the subject are not very conclusive, but they tend to support the view I take. In the latest case especially, viz., that of *Reg.* v. *Liverpool* (1) Blackburn, J., appears to have read the section in a similar manner to that in which I am construing it. He treats the concluding words as intended to cover only charges and expenses for the purposes of the constabulary force ejusdem generis with what has gone before. For these reasons I am of opinion that this rule must be made absolute.

Rule absolute.

Solicitors for applicant: *Torr, Janeways, Torr, & Gribble.*
Solicitors for town council: *Geare & Son, for Gidley.*

(1) 41 L. J. (Q.B.) 174.

CLARK, APPELLANT; THE ASSESSMENT COMMITTEE OF ALDERBURY UNION AND THE OVERSEERS OF FISHERTON-ANGAR, RESPONDENTS.

1880. *Nov.* 27.

Q. B. D.

Poor-rate—Rateable Value—Refreshment Rooms at Railway Station—Rent reserved—Evidence of Actual Profits—Practice—Case stated by Sessions—Costs—Civil Proceedings—Rules of 1880, *Order LXII., rule* 2.

The refreshment rooms upon a railway station having been let to a contractor for a term of years at a fixed annual rent, he appealed against a poor-rate made upon him as occupier of the premises, and at the hearing of the appeal sought to prove by his own testimony and by his account books, shewing the receipts and expenditure during the past year in respect of the refreshment rooms, that the business was carried on at a loss, and that the rent reserved did not represent the true annual value of the premises:—

Held, that such evidence ought to have been received as an element in ascertaining the rateable value.

Reg. v. *Guardians of North Aylesford* (37 J. P. 148) explained.

Where a case is stated by sessions upon appeal against a poor-rate, the proceeding is a civil proceeding on the Crown side of the Queen's Bench Division, within the rules of 1880, Order LXII., rule 2, and the costs are in the discretion of the Court under Order LV.

UPON appeal to the Salisbury sessions against a poor-rate of the 19th of July, 1879, for the parish of Fisherton-Angar, Wilts, in which the appellant was rated in respect of certain premises, the recorder ordered the rate to be amended by reducing the gross estimated rental to 400*l.*, and the rateable value to 320*l.*, subject to the opinion of the Court upon a case, of which the following is the material part:—

The appellant is the lessee of the refreshment rooms at the Salisbury station of the London and South Western Railway Company, under an agreement dated the 6th of February, 1879.

[The case then set out the agreement, by which the company let the refreshment rooms on the up and down side platforms of the station at Salisbury for the term of five years, from the 24th of June, 1878, at a rent equal to 12½ per cent. on the gross receipts at the refreshment rooms for each year, if the percentage should exceed 1000*l.*, and if the percentage should in any year be less than 1000*l.*, then at a rent of 1000*l.* for that year.]

On the 16th of January, 1879, a supplemental valuation list

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was approved by the assessment committee, in which the appellant was rated in respect of the refreshment rooms at 1000*l.* gross, and 800*l.* net rateable value, and in January and April, 1879, two rates were made in accordance with this valuation list. Upon appeal another list was, in March, 1879, approved by the committee, in which the rating of the appellant's property was at 1000*l.* gross, and 900*l.* rateable value. A rate having been made according to this list, the appellant appealed to the sessions, and upon the hearing of the appeal he was called by the respondents and proved that he rented all the principal refreshment rooms belonging to the London and South Western Railway Company. That previously to 1878 there was only one refreshment room at the Salisbury station, which was rented at a rent of 400*l.* a year. In 1878 a second refreshment room was built on the up side of the line, and both the refreshment rooms were put up by the company to be let by public tender. The former occupier of the first room tendered a rent of 800*l.*, and the appellant the rent reserved in the agreement before referred to, which was accepted.

The appellant, in cross-examination, proved that since the building and letting to him by the company of the second refreshment room neither the trains nor the passengers had increased in number, and that after twelve months he found that he had incurred a considerable loss in his trading at the two rooms, and in support of the appeal he tendered evidence of two kinds. First, the evidence of an accountant, to prove from the appellant's books the amount of his total gross receipts and gross expenditure with respect to the refreshment rooms in question, for provisions, lights, salaries, rates, and all other expenses in connection with the same during the year 1879, which shewed that the appellant, in the thirteen months' trading at the refreshment rooms ending the 30th of June, 1879, had lost 457*l.* 17*s.* 5*d.*, and in the twelve months ending the 31st of December, 1879, had lost 796*l.* 18*s.* 8*d.*; and, secondly, the evidence of a surveyor and valuer, to prove, taking those figures as the basis of his calculations, what amount of rent the tenant could actually have afforded to pay his landlord for the year 1879, after allowing the tenant a trade profit of 10 per cent. on

capital, &c. The respondents objected to the reception of this evidence, but it was received subject to the objection.

The appellant's witnesses were then called, who proved the facts before mentioned, the surveyor valuing the gross rent to an hypothetical tenant at 318*l.*, stating that in practice a very common mode for a refreshment contractor to ascertain what rent he should pay for his premises was to take a percentage on his receipts. He further stated that he was unable to estimate what the premises might fetch if put up again to let by public auction. The respondents called no witnesses, and the order was made amending the rate.

The questions for the opinion of the Court were: first, whether evidence was admissible to shew that the yearly value of the premises in question was less than the rent actually paid for them; secondly, whether evidence was admissible of the cost to the appellant of the provisions supplied to the refreshment rooms, and of the expenses of management of the same.

Nov. 20. *A. Wills, Q.C.*, and *G. P. Goldney*, for the respondents. The evidence ought not to have been received. *Reg.* v. *Verrall* (1) where it was held that, upon appeal against a rate in respect of premises used as a racecourse, the account books of the occupier ought to be considered as an element in ascertaining the rateable value of the occupation, may at first sight appear an authority for the contrary proposition. But a racecourse is a property of a peculiar description, as to which there is no recognised standard of the annual value. As in the case of docks, railways, and piers, the value cannot be calculated by comparison with other property of the like kind, but can only be ascertained by an inquiry into the profits. If *Reg.* v. *Verrall* (1), cannot be distinguished on this ground, it is wholly inconsistent with *Reg.* v. *Guardians of North Aylesford.* (2) There the occupier of cement works, and also of a chalk pit near them, was separately rated for each, and owing to the chalk pit being near the cement works, he made large profits, while the occupiers of other pits who had no cement works used the chalk for less profitable purposes. It was held that the occupier ought not to be rated to a higher amount in respect of

(1) 1 Q. B. D. 9. (2) 37 J. P. 148.

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the extra profit, and that questions asking him how many casks of cement he made during the last year, and what was the price of cement per cask were inadmissible. Blackburn, J., said, "The true test is not what a tenant could afford to give, but what a tenant would be likely to give who took the pit from year to year. It is not the profits a man makes that make the difference, for whether he gains or loses in his trade, the rateable value is the same."

[BOWEN, J. Those questions appear to have been founded upon a suggested connection between the cement works and the chalk pit, and the Court may have thought them too remote, without holding that general questions as to profit were inadmissible.]

The argument remains that the profit earned during a particular year is not a fair test of the annual value.

F. M. White, Q.C. (*Bullen*, with him), for the appellant, was not heard.

FIELD, J. I have no doubt about this case at all. The appellant had been for some years the occupier of the refreshment room at Salisbury, and in consequence of the traffic of the South Western Railway increasing on the direct line to Exeter, the company opened a new platform, and instead of having one refreshment room to which everybody must go, whatever part of the world he was going to, they had two refreshment rooms, one upon one platform, and one upon the other. Two persons competed for these rooms, the former occupier of the first room and the appellant. The appellant offered the higher rent, and the directors accepted his tender. At the hearing of the appeal a question was raised, which the recorder has reserved for us, whether or not the sessions were entitled, in considering what the premises would let for, to take into account certain elements. These elements were as follows:—The respondents contended that the rent of one thousand pounds a year was the rateable value. The appellant, on the other hand, in substance contended that a refreshment room was a piece of ground or space or land occupied for a particular purpose, and that although in the case of twenty houses in a street all of the same size and let to the same class of tenants, you might

ascertain the annual value upon some general principle, however rough it might be, yet that did not apply here, because you could not find another refreshment room in the same area, nor could you find another refreshment room on the South Western Railway at Salisbury. All the elements of the value of the place depend upon where it is, and what it is, and it was proposed to shew that by reason of the price of provisions, and by reason of the small number of persons at the station, it was not worth a man's while to carry on the business. The appellant might of course be cross-examined to shew that he might have got his provisions cheaper, and made a larger profit, but the question is, are we to hold that the evidence he offered was inadmissible, and that the sessions must not hear it? In *Reg.* v. *Verrall* (1), the precise point arose conversely with regard to a racecourse. It was sought on the part of the rating authority, the parish, to shew from the appellant's books, that he was making more than he said he was. The Court held that this might be done, and as far as I was concerned, the ground on which I intended to decide was, that it was an element which we could not exclude from the estimate. As for *Reg.* v. *North Aylesford Union* (2), when you look into it, all that the Court decide is, that in their judgment the question went not to shew what was the value of the hereditaments to let, but what the particular mode of carrying on the business by the appellant, was, and whether this particular and personal mode of carrying on the business ought to increase the amount of the rate.

Under these circumstances, I think *Reg.* v. *North Aylesford Union* (2) will stand with *Reg.* v. *Verrall* (1), and I answer the question which has been put by the recorder in the affirmative, that the evidence was admissible.

BOWEN, J., concurred.

Judgment for the appellant.

Nov. 27. *F. M. White, Q.C.*, on behalf of the appellant, applied for the costs of the proceedings in this court. Formerly, the appellant would have got his costs by virtue of the recognizance

(1) 1 Q. B. D. 9. (2) 37 J. P. 148.

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given on the issuing of the certiorari. By the Rules of 1880, Order LXII., rule 2, the provisions of Order LV. are applied to civil proceedings on the Crown side of the Queen's Bench Division. The Court has therefore discretion to give costs. Order LXII., rule 6, is not an exhaustive definition of what are civil proceedings for the purposes of the order.

Wills, Q.C., for the respondents, admitted that he could not contend that the case was not within Order LXII.

THE COURT (Field and Manisty, JJ.) ordered that the appellant should have his costs.

Application granted. (1)

Solicitors for appellant: *G. Davis, Morgan, & Co.*

Solicitors for respondents: *Taylor, Hoare, & Taylor, for Wilson & Son, Salisbury.*

(1) In the case of the *Queen* v. *Baxendale*—which was a special case from the Salford Borough Sessions, upon appeal against a summary conviction by justices, under the Weights and Measures Acts—a similar application was upon the same day made on behalf of the respondent, who had succeeded at the sessions and in this court.

E. Sutton, appeared for the respondent, and contended that the proceedings were civil proceedings within Order LXII.

E. J. Dunn, for the appellant.

Addison, Q.C., for the justices.

The Court refused the application, on the ground that the proceedings were not civil proceedings within the order.

MANZONI *v.* DOUGLAS.

1880
Dec. 10.

C. P. D.

Negligence—Driving Carriage in a public Thoroughfare.

A horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and, notwithstanding the utmost efforts of the driver to control him, swerved on to the footway and injured the plaintiff:—

Held, no evidence of negligence to go to a jury.

And held, that the fact that the horse had cast a shoe shortly after he bolted, and that the driver did not under the circumstances in which he was placed call out or give any warning, did not alter the case.

Hammack v. *White* (11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129), upheld.

CASE remitted by this Court to the Westminster county court, under 30 & 31 Vict. c. 142, s. 7.

It was an action to recover damages for personal injury sustained by the plaintiff from the alleged negligent driving of the defendant's servant. The evidence as disclosed upon the judge's notes was as follows:—

Plaintiff. On the 9th of June, 1879, I was walking along Cockspur Street, on the side near the park, from Pall Mall towards Mapleson's Opera House. I was knocked down, and knew nothing till I was in the hospital. I was on the foot-pavement. I was knocked down from behind. On cross-examination he said,—I did not hear any one call out; nor did I hear any shout.

Robert Davis: I saw the accident. The plaintiff was walking along the pavement opposite Mr. Bayley's. A brougham was coming from Charing Cross towards the Haymarket at a tremendous speed,—twelve to fourteen miles an hour, I should think. The horse was galloping. The coachman was trying his hardest to stop the horse, and he was not able to do so. The horse seemed to lurch from Waterloo House, coming across the road, and was thrown over by the kerb by Mr. Bayley's. The horse fell on the pavement. I saw two horse-shoes.

[The plaintiff's counsel proposed to give evidence of the state of the horse's shoes. The defendant's counsel objected that the claim was for negligent driving. The plaintiff's counsel contended

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that to drive a horse with an improper shoe was negligent driving; whereupon the defendant's counsel objected that such evidence was inadmissible, for the reason already given. The judge allowed the objection. The plaintiff's counsel then applied for leave to amend by adding the words "or by the negligence of your servant, in neglecting to take care that the horse was properly shod." The defendant's counsel objected; and the judge refused to amend.]

John Raynes: I am clerk in the railway booking office. I did not see the accident. I saw a brougham being driven from Whitehall towards Charing Cross. It came along at a very quiet pace. The horse bolted all at once alongside of Scotland Yard. He threw a shoe right opposite the office just as he bolted. He threw a second shoe in about three strides after: it went right up into the air. I kept the shoes till two or three weeks ago, and gave them away to a boy.

Cross-examined: The horse bolted opposite the Admiralty, that is, opposite Scotland Yard. When he threw the shoe he was galloping. The horse bolted about twenty yards from where I was standing. He threw the first shoe opposite my office. The coachman was doing all he could do to stop the horse. He had no control at all over the horse.

Re-examined: The horse dropped the first shoe about twenty yards from the bolt.

The defendant's counsel submitted that there was no case to go to the jury: there was no evidence of negligence.

The judge was of that opinion, and upon the authority of *Hammack* v. *White* (1), directed a nonsuit.

July 26. *Daniel* obtained a rule nisi for a new trial.

Pollard shewed cause. The decision of the county court judge was clearly right. There was no evidence of negligence on the part of the defendant's coachman upon which a jury could reasonably have acted. The cases of *Cotton* v. *Wood* (2) and *Hammack* v. *White* (1), which were recognised in *Smith* v. *Great Eastern*

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

(2) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333.

Ry. Co. (1), are decisive of the question. To entitle him to recover in an action of this sort, the plaintiff must give affirmative evidence of negligence: it is not enough to shew a state of things which is equally consistent with negligence or the absence of negligence.

Daniel, in support of the rule. There was reasonable evidence of negligence for a jury, therefore the cases relied upon do not apply; and, if they did apply, *Cotton* v. *Wood* (2) and *Hammack* v. *White* (3) are no longer to be considered as authorities. The last-mentioned case proceeded upon the ground that the defendant had done all he could to prevent the accident. Here, there was nothing to shew how or why the horse bolted, or that the driver did anything to endeavour to prevent the accident, as, by calling out to foot-passengers. That of itself was at least as much negligence as was relied on in *Bridges* v. *North London Ry. Co.* (4) There has been a singular difference of opinion amongst judges as to what amount of evidence will suffice to cast upon the defendant the burden of rebutting the charge of negligence. In *Mitchil* v. *Alestree* (5), the declaration stated that the defendant did ride a horse into a place called Lincoln's Inn Fields (a place much frequented by the king's subjects, and unapt for such purposes), for the breaking and taming of him, and that the horse was so unruly that he broke from the defendant and ran over the plaintiff, &c.; it was moved in arrest of judgment that here is no cause of action, for, it appears by the declaration that the mischief which happened was against the defendant's will, and so damnum absque injuriâ. But the Court said it was the defendant's fault to bring a wild horse into such a place, where mischief might probably be done by reason of the concourse of people. In *Christie* v. *Griggs* (6), which was an action to recover damages for an injury arising from the breaking down of a stage-coach, the plaintiff having proved that the axle-tree snapped asunder at a place where there was a slight descent from the kennel crossing the road, whereby he was precipitated from the top of the coach and hurt, it was contended for the defendant that the plaintiff was bound to

(1) Law Rep. 2 C. P. 4.
(2) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.
(4) Law Rep. 7 H. L. 213, 238.
(5) 1 Vent. 295.
(6) 2 Camp. 79.

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proceed further, and give evidence either of the driver being unskilful or of the coach being insufficient: but Sir James Mansfield said: "I think the plaintiff has made a primâ facie case by proving his going on the coach, the accident, and the damage he has suffered. It now lies on the other side to shew that the coach was as good a coach as could be made, and that the driver was as skilful a driver as could anywhere be found. What other evidence can the plaintiff give?"

[DENMAN, J. Surely that cannot be the test.]

In *Byrne* v. *Boadle* (1), the plaintiff was walking in a public street past the defendant's shop, when a barrel of flour fell upon him from a window above the shop and injured him: and it was held that this was sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence. A passage from the judgment of Erle, C.J., in *Hammack* v. *White*, being cited, where he says (2), "I am of opinion that the plaintiff in a case of this sort is not entitled to have his case left to the jury unless he gives some affirmative evidence that there has been negligence on the part of the defendant," Pollock, C.B., says: "If he meant to apply that to all cases, I must say, with great respect, that I entirely differ from him;" and Bramwell, B., adds: "No doubt, the presumption of negligence is not raised in every case of injury from accident; but in some it is. We must judge of the facts in a reasonable way; and, regarding them in that light, we know that these accidents do not take place without a cause, and in general that cause is negligence." In *Scott* v. *London Dock Co.* (3), Erle, C.J., expressing the opinion of the majority of the judges, says: "There must be reasonable evidence of negligence. But, where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

[DENMAN, J. That was the case of an inanimate object, a

(1) 2 H. & C. 722; 33 L. J. (Ex.) 13. (2) 11 C. B. (N.S.) at p. 594. 8 Jur N.S. 497

10 Jur N.S. 1107 (3) 3 H. & C. 596; 34 L. J. (Ex.) 220. 10 Jur N.S. 1106

bale of goods: and there is no overruling of *Hammack* v. *White*. (1)]

But a rule is propounded which is inconsistent with the decision in that case. The same principle is enunciated in *Briggs* v. *Oliver* (2), where Cockburn, C.J., left the question of negligence to the jury. In *Kearney* v. *London, Brighton, and South Coast Ry. Co.* (3), as the plaintiff was passing along a highway under a railway bridge of the defendants, which was a girder-bridge resting on a perpendicular brick wall, with pilasters, a brick fell from the top of one of the piers on which a girder rested, and injured the plaintiff; a train had passed just previously, and on subsequent examination other bricks were found to have fallen out. The bridge had been built and in use three years. It was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, and that there was evidence from which the jury might infer negligence. In *Simson* v. *London General Omnibus Co.* (4), a passenger in an omnibus was injured by a blow from the hoof of one of the horses, which had kicked through the front panel of the vehicle. There was no evidence that the horse was a kicker; but it was proved that the panel bore marks of other kicks, and that no precaution had been taken, by the use of a kicking strap or otherwise, against the possible consequences of a horse kicking out, and no explanation was offered on the part of the defendants: and it was held that there was evidence of negligence proper to be submitted to a jury. Bovill, C.J., in giving judgment, says: "It is true that the mere fact of the happening of an accident is not, as a general rule, even primâ facie evidence of negligence: but if the cause of the accident be shewn, it may or may not, according to circumstances, be evidence for the jury. In the case of a public carriage, the owner is bound to provide proper horses, and such as will not unduly endanger his passengers. In the event of an accident arising from their unfitness, it is not necessary to shew that the owner was aware of such unfitness. In

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

(2) 4 H. & C. 403.

(3) Law Rep. 6 Q. B. 759.

(4) Law Rep. 8 C. P. 390.

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the present case, a horse drawing an omnibus belonging to the defendants, without any assignable cause kicks out and strikes and injures the plaintiff, who was riding in the vehicle. It seems to me that that alone presents a case which calls for some explanation on the part of the proprietors. It is said that it is the nature of a horse to kick. But I think it ought not to be the nature of a horse employed to draw a public vehicle to kick. Proof having been given that the horse in question had misconducted itself in the way charged, the burden of shewing that he was not habitually a kicker, or something to account for his having kicked on this particular occasion, lay on the defendants. The mere fact of his having kicked out was, I should say, primâ facie evidence for the jury. Bnt there was further evidence. It was proved that there were marks of other kicks on the omnibus besides that which was made on the occasion in question. It was left in doubt how those marks were produced. It was impossible to withdraw that evidence from the jury. The defendants might and ought to have explained it." Here, the defendant's horse bolts without any apparent cause: that surely is some evidence of negligence, in the absence of explanation on the part of the defendant. The casting the shoes, and the absence of warning to persons on the footway, also afforded some evidence which should not have been withheld from the jury.

DENMAN, J. I am of opinion that the nonsuit in this case was right. I will first deal with the question whether *Hammack* v. *White* (1) is still to be considered as law. I think it is. The cases of *Mitchil* v. *Alestree* (2) and *Christie* v. *Griggs* (3) are inapplicable. In the former the decision turned upon the knowledge of the rider that the horse was of a wild nature and one which it was improper to exercise, for the purpose of taming him, in a public thoroughfare; and in the latter it turned upon the duty of the proprietor of a public vehicle to provide one which was reasonably safe for the purpose. The subsequent cases in which *Hammack* v. *White* (1) has been cited do not in any one instance shew that that case is not still good law. No single judge has

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129. (2) 1 Vent. 295.
(3) 2 Camp. 79.

intimated any dissatisfaction with the decision: but all have rather approved of it. With the exception of *Simson* v. *London General Omnibus Co.* (1), none of these cases deal with the misconduct of an animate creature, but all were cases of accidents arising from the mismanagement of an inanimate thing,—a cask or a bale of goods, or insufficient tackle. The passage in the judgment in *Scott* v. *London Dock Co.* (2), "There must be reasonable evidence of negligence. But, where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care,"—was applied to a bale of goods slung from a crane overhanging a public thoroughfare falling through some unexplained cause and injuring a passer by. Now, the two things,—a bale of goods falling and a horse bolting,—are so totally different in their nature that I think it would be a strong thing to hold that the principle there enunciated was intended to apply to the case of a horse. It is impossible to say that horses do not sometimes bolt without any negligence or unskilfulness of those having the charge of them. Here the evidence was, that the horse started off and became uncontrollable; and no question was put to either of the witnesses as to negligence on the part of the driver. We cannot, therefore, assume that there was negligence. The last case cited, *Simson* v. *London General Omnibus Co.* (1), seems at first sight to be more germane to the present case, because it was a case of injury from the kick of a horse. But the judgment puts it upon a ground which is not at all overruling *Hammack* v. *White.* (3) Bovill, C.J., puts it expressly upon the duty of a person keeping a public vehicle "to provide proper horses, and such as will not unduly endanger his passengers." This is the case of a private person having a horse which suddenly bolts without, as I read the evidence, any negligence on the part of the driver. That is extremely like the case of *Hammack* v. *White* (3), which, if still law, fully warrants us in holding that the county court judge was

(1) Law Rep. 8 C. P. 390. (2) 3 H. & C. 596; 34 L. J. (Ex.) 220.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

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right in nonsuiting the plaintiff. The statement of claim is that a horse driven by a servant of the plaintiff was so negligently driven that he knocked down and injured the plaintiff. The evidence was this: the plaintiff was walking on the foot-pavement in Cockspur Street, and was knocked down by the defendant's horse, and injured. In answer to a question put to the plaintiff on his cross-examination, he said that he did not hear any one call out. A witness who saw the accident stated that "the coachman was trying his hardest to stop the horse, and he was not able to do so." At this stage of the trial the plaintiff's counsel proposed to call witnesses to shew that the horse's shoes were insufficient, or that they were insufficiently fastened. But the defendant's counsel objected that this would not constitute "negligent driving," which was all that was charged in the statement of claim. The learned judge allowed the objection, and declined to amend the statement of claim. The point, however, ultimately came to nothing; for, the next witness, who saw the horse bolt, stated that the first shoe was cast about twenty yards after the bolt. This witness also proved that the coachman was doing all he could to stop the horse, but that he had no control over it. Looking at the whole of the evidence and at the course taken at the trial, I think there was no primâ facie evidence of negligence on the part of the defendant's coachman which ought to have been left to the jury. It was said that the driver was guilty of negligence, because he did not call out. The words "without any warning," in the statement of claim were not inserted as a substantive allegation of negligence. Besides, there was no evidence we could rely on as to that, or that the omission to call out was the cause of the accident. All that appears upon that subject is the plaintiff's statement on cross-examination that he did not hear it. The whole thing would necessarily take place in a moment; and there could be no inference of negligence from the absence of warning. And we could not on that ground distinguish the case from *Hammack* v. *White*. (1) The nonsuit was right, and this rule must be discharged.

LINDLEY, J. I am of the same opinion. The plaintiff was

(1) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

lawfully walking on the foot pavement of a public thoroughfare, and was knocked down by a horse drawing the plaintiff's brougham. If the case had been left there, it might be that the defendant was liable for negligent driving of her servant. But the explanation was given by the plaintiff's witnesses, viz. that the horse had bolted and the defendant's coachman had lost all control over it. We do not know what it was that caused the horse to bolt; and therefore we have no evidence that it was caused by the driver's negligence or want of care. It is said that negligence is to be inferred from the fact that the driver did not call out or give warning. I cannot see that that per se affords any ground for inferring negligence. The coachman himself was in fear for his own life; and the probability is that in such circumstances even a cool man might abstain from calling out. Then it is said that the fact of the horse having cast one or two shoes was some evidence of negligence: but I cannot see that the fact of a horse having cast a shoe after he has bolted affords any evidence of negligent *driving*. To hold that the mere fact of a horse bolting is per se evidence of negligence would be mere reckless guesswork. To entitle him to recover in an action of this kind, the plaintiff must make out a clear primâ facie case by evidence which will warrant an inference of negligence. This, I think, the plaintiff has failed to do here. It is then said that *Cotton* v. *Wood* (1) and *Hammack* v. *White* (2) have been overruled. In my opinion they are quite consistent with the principle laid down by Erle, C.J., in *Scott* v. *London Dock Co.* (3); and I find no case which has expressly overruled them. If upon the evidence as reported to us a verdict had been found for the plaintiff, it would, in my opinion, have been perfectly unwarrantable.

Rule discharged.

Solicitors for plaintiff: *Farlow & Jackson.*

Solicitors for defendant: *Meynell & Pemberton.*

(1) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333. (2) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

(3) 3 H. & C. 596; 34 L. J. (Ex.) 226.

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C. P. D.

IN THE MATTER OF MARY GERALDINE LACEY, AN INFANT.

Married Woman—Acknowledgment of Deed under 3 & 4 *Wm.* 4, *c.* 74, *s.* 84—*Varying the Certificate by omitting the Words "of full Age."*

By order of a Vice-Chancellor indentures of settlement were directed to be executed by a married woman who was an infant. This Court allowed the certificate of acknowledgment under 3 & 4 Wm. 4, c. 74, s. 84, to be varied by omitting the words "of full age."

Nash moved for an order under the Act for the abolition of fines and recoveries (3 & 4 Wm. 4, c. 74), s. 84, that the form of the certificate therein prescribed of the due taking of an acknowledgment of Mrs. Lacey before special commissioners at Waterford might be varied by omitting therefrom the words "of full age." It appeared that by an order made by Vice-Chancellor Hall in the Matter of The Estate of Maurice Fitzgerald, deceased, wherein Mary Geraldine Fitzgerald and others were plaintiffs, and Richard Ryder and Annie Fitzgerald defendants, and in the Matter of the Act of Parliament 18 & 19 Vict. c. 43 upon the petition of Mary Geraldine Fitzgerald (an infant) by her next friend, after reciting that by the certificate of the chief-clerk of the judge it was found that a valid marriage had been solemnized between the said Mary Geraldine Fitzgerald and Claude William Lacey, and the judge being of opinion that the settlement proposed to be effected by certain indentures therein mentioned was a proper settlement to be made upon the said marriage of the property of the said infant comprised therein, it was ordered that Claude William Lacey and the said infant Mary Geraldine Lacey and the trustees therein named should execute the therein-mentioned indentures. Certain of the indentures to effect the settlement required to be acknowledged by Mary Geraldine Lacey, and, she being resident at Waterford, a special commission had issued to take her acknowledgment, but, she being still an infant, it was necessary to obtain the order of this Court to vary the form of the certificate to meet the case.

He referred to *In re Sarah Luke*. (1) In that case, Mrs. Sarah Luke, an infant trustee, had before her marriage been ordered by

(1) 1 N. C. 165.

the Court of Chancery of the Duchy of Lancaster to convey the trust-estate to other trustees pursuant to 11 Geo. 4, c. 60, s. 6. Before the conveyance could be drawn up, and while she was still an infant, the lady married, and it became necessary that she should make an acknowledgment under 3 & 4 Wm. 4, c. 74, the 84th section of which requires that the person or persons taking the acknowledgment shall sign a certificate stating amongst other things,—"subject to any alteration which may from time to time be directed by the Court of Common Pleas,"—that the lady appeared before them, and that she was at the time of acknowledging the said deed of full age and competent understanding. The Court under the circumstances made an order authorizing the commissioners to take the acknowledgment without certifying that the lady was of full age.

GROVE, J. The only distinction between that case and this is that there the person whose acknowledgment was to be taken had no beneficial interest, she was a mere naked trustee; here she is beneficially interested in the property to be conveyed. But, there being an order of the Chancery Division for the execution of the deeds by the lady, and we being asked only to remove a formal difficulty as to the mode of execution, it is not a case where any advantage could possibly be taken of her, and therefore I think the order may go.

LOPES, J. The order of the Chancery Division removes all difficulty; and the case of *In re Luke* (1), subject to the remark of my Brother Grove, is an authority in point.

Order made.

Solicitors for applicant: *Davidson, Burch, & Whitehead.*

(1) 1 N. C. 265. And see *Ex parte Wallis*, 7 C. B. (N.S.) 303.

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(C. A.)
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[IN THE COURT OF APPEAL.]

MULLINS *v.* THE TREASURER OF THE COUNTY OF SURREY.

Prisons Act, 1877 (40 & 41 *Vict. c.* 21), *ss.* 4, 57—*Maintenance of Prisons and of Prisoners therein—Expenses of conveying to Prison—Liability of Secretary of State for.*

8 Q.B.D. 342

A metropolitan police magistrate, having summarily convicted an offender and adjudged her to be imprisoned, made out a warrant for her commitment; in obedience to which warrant the plaintiff, a police constable, duly conveyed her to prison. By reason of such conveyance the plaintiff incurred certain expenses which the prisoner had no means to defray. The magistrate subsequently made an order under 27 Geo. 2, c. 3, directed to the defendant, ordering him to pay to the plaintiff the amount of such expenses. The defendant refused to comply with the order, on the ground that the liability to pay the expenses of conveying prisoners to prison had been transferred from the county to the Secretary of State by s. 4 of the Prisons Act, 1877, which provides that, "After the commencement of the Act all expenses incurred in respect of the maintenance of prisons to which the Act applies and of the prisoners therein shall be defrayed out of moneys provided by Parliament." A similar question arose with regard to the expenses of conveying from the police court to the prison a man committed to take his trial for felony:—

Held, reversing the decision of the Court below, that the expenses of conveying prisoners to prison were by s. 4 transferred to the Secretary of State, and that the word "therein" in that section pointed to the class of prisoners to whose maintenance the Act was intended to apply, not to the period of time from which the liability for such maintenance was to commence.

Affirmed by H. of L. 7 App. Cas. 411

Appeal by the defendant from the decision of Lush and Manisty, JJ. (1), who were of opinion that s. 4 of the Prisons Act, 1877, referred only to the expenses of prisoners incurred subsequently to their reception in prison. (2)

(1) 5 Q. B. D. 170.

(2) 40 & 41 Vict. c. 21, s. 4: "On and after the commencement of this Act all expenses incurred in respect of the maintenance of prisons to which this Act applies, and of the prisoners therein, shall be defrayed out of moneys provided by Parliament."

Sect. 57: "A 'prisoner' for the purposes of this Act means any person committed to prison on remand or for trial, safe custody, punishment, or otherwise, and 'the maintenance of a prisoner' includes all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority, with this proviso, that nothing in this Act shall exempt a

Sir F. Herschell, S.G., and *E. Baggallay* (*E. Clarke, Q.C.*, with them), for the defendant. The expense of conveying a prisoner to prison is within the term "maintenance of a prisoner" as defined by s. 57 of the Prisons Act, 1877. In the first place it is an expense incurred at a time subsequent to that of the prisoner's committal to prison. A person is committed to prison, not at the time of his being lodged in the prison, but at the date of the authority given by the magistrate to the constable to take him there. The word "committal" refers to the act of the magistrate not to the fact of the prisoner's confinement. But then it is contended by the plaintiff that inasmuch as by s. 4, the Secretary of State is to be liable only for the maintenance of the prisons and of the prisoners "therein," the word "committal" in s. 57 cannot be used in its ordinary sense, but must mean actual lodgment in prison. The word "therein," however, must receive a more extended meaning; it must include the prisoners whose ultimate destination is in the prison. It points rather to the class of prisoners to whom the Act is to apply.

In the next place this is an expense which, if this Act had not passed would have been payable by a prison authority. Before the Act the justices assembled in quarter sessions were in the case of a county prison the "prison authority," and the expense of conveying a prisoner to prison would have been payable by the justices in quarter sessions, under 27 Geo. 2, c. 3. It is true that the county treasurer, who in fact would have paid the money to the constable, would have derived his authority to do so, not from the justices so assembled as a body, but from a single justice of the county; and it is also true that the quarter sessions would have had no power to disallow such payment by the treasurer in their audit of his accounts; but these facts would not have made such payment any the less a payment by the quarter sessions if the money would have come out of their fund. The words "as would have been payable by a prison authority" mean "as would have been payable out of the fund which the prison authority had to administer." If the defendant's

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prisoner from payment of any costs or expenses in respect of his conveyance to prison or otherwise which he would have been liable to pay if this Act had not passed."

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contention is not right, then there is this difficulty, that no meaning whatever can be given to the proviso at the end of s. 57.

Sir H. Giffard, Q.C. (*Poland*, with him), for the plaintiff:—To the contention that this is an expense that would have been payable by a prison authority before the passing of the Act there are two answers:—First, The payment would not have been in any sense made by the quarter sessions, even if when allowing such payment at the audit of the treasurer's accounts they were acting as the prison authority. For they had no power to disallow it, and the treasurer in paying the money in no sense acted as their representative or by their authority. Secondly, Even if the allowance of the payment could be said to be a payment by them, still they were not, in so allowing it, acting in their capacity of prison authorities. The liability of the county treasurer to make this payment and of the quarter sessions to allow it depends on 27 Geo. 2, c. 3, and 11 & 12 Vict. c. 42, at the time of the passing of which Acts there was no such thing as a "prison authority." The words "prison authority" for the first time occur in the Prison Act, 1865, which Act leaves the two above mentioned Acts untouched; and the reason why it left them untouched was that the expense in question was not a prison expense at all, but a constable's expense.

But assuming that this was an expense payable by a prison authority, still this is no part of the expense of maintenance of a prisoner, being incurred prior to the period of committal. Sect. 57 must be read in connection with s. 4; and, unless the word "therein" is to be altogether struck out of that section, a prisoner must be regarded as committed to prison only from the time when he is actually in prison. This construction, it is true, practically disregards the proviso in s. 57; but if on the fair construction of that section this expense cannot be brought within the terms of the enacting part, then the Court are not entitled to look at the proviso.

E. Baggallay, in reply.

LORD SELBORNE, L.C. That the Divisional Court from which the appeal is brought must have felt considerable difficulty in

dealing with this question, is evident from the frank admission which the learned judges made in their judgments, that the conclusion at which they arrived was unsatisfactory, inasmuch it involved the consequence of having to reject the proviso in s. 57 altogether. The rejection of that proviso however appeared to them the only difficulty. With the greatest deference to the learned judges I must say that I am by no means satisfied that if there had been no proviso I should have come to a different conclusion from that at which I actually arrive, which is in favour of the appeal.

Now I observe, and that increases one's impression of the difficulty which the two learned judges must have felt, that their judgments do not proceed on the same ground. Lush, J., bases his judgment on the meaning which he thinks ought to be attributed to the words, "committed to prison," in s. 57. He says, "I think it is clear, looking to the words of the 4th section, which throws the maintenance of the prisons and of the prisoners 'therein' on the Secretary of State, that 'committed' must mean actually in prison." I confess I cannot adopt that conclusion. But for the word "therein" in the 4th section I should have thought it quite clear, both from the natural and popular use of the words, "committed to prison," and also from the manner in which those words have been used by the legislature in other Acts in pari materiâ, that they refer to the authority given by the magistrate for the person being in prison. It appears to me to be clear that that is the sense in which the term is used in Jervis' Act, 11 & 12 Vict. c. 42, by the 25th and 26th sections of which power is given to the justices by a warrant in a certain form to commit any person accused to the common gaol or house of correction for the purpose of being there safely kept until he shall be delivered by due course of law. The word "commit" there expresses the act of the justices. Then again the forms which are referred to in those sections distinctly shew that that is what is meant in that Act. For instance, the order in Form T 1, which is called a warrant of commitment, is an order given by the justice to the constable, to take the person accused and him safely convey to the prison and there deliver to the keeper thereof. Then again the following Form T 2, is entitled,

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"Gaoler's receipt to the constable for the prisoner, and justice's order thereon for payment of the constable's expenses in executing the commitment." And amongst the expenses, to which under that form the constable is entitled, are the expenses of "subsistence of prisoner whilst in custody after commitment." But the constable's custody of the prisoner ceases immediately upon his delivery to the keeper of the gaol. Nothing, therefore can be more clear than that the word "commit" in that statute refers to the act of the justices in authorizing the conveyance of a person to prison. On what ground then are we to depart from that sense in construing the Act before us? As far as I can see the learned judge proceeded solely on this ground, that the 4th section only transfers to the Secretary of State the expenses of maintaining the prisons and the prisoners "therein," and then he reads the word "therein" as limiting the liability for the prisoners' maintenance to the time when they are actually in prison. But with great deference to the learned judge, I cannot agree that the word "therein" has the meaning which he has ascribed to it. I think it was merely intended thereby to designate the class of prisoners for whose maintenance the Secretary of State was to be liable, namely, the prisoners who are imprisoned in the prisons to which the Act applies. I grant that if it cannot be shewn that a person is a prisoner in any such prison, he is not a prisoner whose maintenance is provided for. But on turning to the 57th section and reading it in connection with s. 28, it seems perfectly clear that the maintenance of a prisoner includes expenses incurred not only while he is in prison, but also while he is on his way to prison. By s. 28 a prisoner is to be deemed to be in legal custody whenever he is being taken to a prison in which he may be lawfully confined. He is not in prison de facto until he gets into prison, but for the purposes of the Act, and of the custody which the Act speaks of, he is equally a prisoner in legal custody when on his way to prison. And then s. 57 says that the maintenance of a prisoner shall include expenses incurred in respect of the prisoner's custody. I am therefore unable to accede to the interpretation put by Lush, J., on the words "committed" and "therein," which was the foundation of his decision.

Then we come to the grounds upon which Manisty, J., rested

his judgment, and there I agree that, if these expenses cannot be brought within the words of s. 57, "such necessary expenses as would if this Act had not passed have been payable by a prison authority," then the defendant must fail. Now it is said that these expenses were not before the Act paid by the quarter sessions at all, and that, even if they were, they were not paid by them in their capacity of prison authority. No doubt the hand which paid the expenses was the hand of the county treasurer, and he derived his authority for so paying them not from the justices in sessions assembled but from a single justice; still that justice was one of the body of justices acting for the county, and I think it must be taken that the treasurer was acting on behalf of the justices in quarter sessions, especially when one considers that he paid the money out of a fund, the general administration of which was vested in them. I think the reasonable interpretation of the words "payable by a prison authority" is to refer them to the persons out of whose fund the payment is to be made.

Then, as to the other point, the justices were not, it is true, expressly constituted the prison authority under that title until the year 1865; but long before that, and before the words "prison authority" became technical, the justices were de facto the prison authority within their own county, and I think the legislature in s. 57 of the Act before us intended to use the words in the wider sense. I am supported in this view by the fact that, if the words are not to be so construed, no meaning can possibly be given to the proviso at the end of the section.

With regard to the circumstance that the county of Middlesex is dealt with, I know not for what reason, in an exceptional manner by the Act of Geo. II. and by Jervis' Act, and that this class of expense is under those Acts there imposed not on the county rates but on the parish, all I can say is that, that being so, the county of Middlesex will not get the benefit of the Act of 1877. Why it should not I do not know. But the fact that the Act does not apply to the county of Middlesex is no reason why it should not apply wherever these expenses are payable by the justices in quarter sessions assembled. The appeal must be allowed.

BAGGALLAY, L.J. I am of the same opinion. The 4th section

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of the Prisons Act, 1877, provides that the expenses of the maintenance of prisoners in prisons to which the Act applies shall be defrayed out of moneys to be provided by Parliament. That section speaks generally of the maintenance of prisoners; but when we come to s. 57 we find what that maintenance is to include, viz.: "all such necessary expenses incurred in respect of a prisoner for food, clothing, custody, safe conduct, and removal from one place of confinement to another, or otherwise, from the period of his committal to prison until his death or discharge from prison, as would if this Act had not passed have been payable by a prison authority." Now, having regard to the language of that section, it is quite clear that such expenses as those which are the subject of the present appeal are expenses of maintenance of a prisoner, within the meaning of the Act, provided they comply with two qualifications: first, they must be incurred during the period commencing with the prisoner's committal to prison and ending with his death or discharge; and, secondly, they must be such as would have before the Act been payable by the prison authority. As to the former, Lush, J., was of opinion that a prisoner could only be said to be committed to prison, within the meaning of the Act, at the time when he was actually put in prison. I am however unable to accede to that view. Quite apart from the assistance to be derived from other Acts of Parliament dealing with the subject, I should be inclined to think that the committal here referred to was the order of committal by the magistrate, under which the constable acts in conveying the prisoner to prison; but this view seems entirely to be borne out by the way in which the word "committal" is used in the sections and forms of Jervis' Act, 11 & 12 Vict. c. 42, to which the Lord Chancellor has already referred. As to the second qualification, I agree with the Lord Chancellor in thinking that these were expenses which before the Act were substantially payable by the prison authority.

BRETT, L.J., concurred.

Judgment for the defendant.

Solicitors for plaintiff: *Hare & Fell, for Solicitor to the Treasury.*

Solicitor for defendant: *Smallpiece.*

WATSON AND ANOTHER *v.* THE GREAT WESTERN RAILWAY COMPANY.

1880
Nov. 27.

C. P. D.

Costs—Short-hand Notes of Evidence at Trial—Special Direction.

It is competent to this Court to make an order for the allowance, on taxation between party and party, of the expense of the short-hand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where from the nature and extent of the evidence it is manifest that the matter could not have been properly disposed of without their aid.

19 L.J. 81-3
10 Q.B.D. 209

THIS was an action against the Great Western Railway Company for so negligently keeping a dock at Millbay, Plymouth Sound, under their control, regulated by an Act of 9 & 10 Vict. c. ccclxxxiii., that a steam-vessel belonging to the plaintiffs, whilst entering the dock under the guidance of a licensed pilot, struck upon a submerged reef and was damaged.

The cause was tried before Lord Coleridge, C.J., at the last Hilary Sittings at Guildhall, when a verdict was found for the plaintiffs. A rule nisi for a new trial on the ground (amongst others) that the verdict was against the weight of evidence, was obtained in the following Easter Sittings. Cause was shewn on the 6th and 9th of November; and on the 27th judgment was given, discharging the rule, with costs.

A. L. Smith (*Benjamin, Q.C.*, with him,) thereupon asked for an order that the expense of the short-hand notes of the evidence given at the trial should be allowed on taxation of the plaintiffs' costs, on the ground that they were essential for the information of the Court upon the argument of the rule as to what passed at the trial, and to enable them to determine whether or not a new trial should be granted. He referred to *Kirkwood* v. *Webster* (1), where it was held that the costs of making for the use of counsel copies of a short-hand writer's notes of evidence taken at the trial will not be allowed as between party and party unless a special direction to that effect is given by the judge at the trial; and he relied on *Hill* v. *Metropolitan Asylum District Board* (2) as

(1) 9 Ch. D. 239.

(2) 28 W. R. 664; 49 L. J. (C.L.) 668.

W.N. (1880) 97, 98

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an authority to shew that the expenses of short-hand notes may be allowed in the Court of Appeal if asked for at the time the judgment is pronounced. Bramwell, L.J., there says: "I have doubts if we have power to allow as costs of the appeal costs which were not incurred for the purpose of the appeal, as, for instance, notes of the evidence." The application there, being made long after the judgment had been entered, was held to be too late. Here, no special direction was given, nor was it asked for, at the trial; because, until the rule nisi for a new trial was obtained, it could not be foreseen that copies of the short-hand notes of the evidence and summing-up would be necessary.

W. G. Phillimore (*J. C. Mathew*, with him), for the defendants. It may well be that, under the Judicature Acts, 1873, 1875, the Court of Appeal (which has the whole matter before it) may have power to allow the expense of short-hand notes, where such expense is necessarily incurred for the purpose of the appeal; and possibly here the Lord Chief Justice might have made a special order upon the subject. But there is no authority for saying that this Court has, or has ever attempted to exercise, such a power.

LINDLEY, J. I have no doubt whatever that we have full power to make the order prayed, and that the allowance of these expenses as costs of the rule is properly asked for at this stage of the proceedings. The case was one of very grave importance; and, from the quantity of evidence given at the trial, it was impossible that the Court could have come to a satisfactory conclusion without the aid of the short-hand notes.

LOPES, J. I also think we have power to make the order as prayed. The taking copies of the short-hand notes of the evidence and of the summing-up was an expense reasonably and properly incurred to enable the plaintiffs to resist the rule. Until the rule nisi was obtained it could not have been anticipated that the notes would be necessary; consequently such a special direction could not have been asked for at an earlier stage. Although we have this power, it does not follow that the expense of short-hand notes is to be allowed in all cases where they are found to be useful or convenient. This, however, was a peculiar case, and one with

which it would have been difficult to deal but for the assistance afforded to the Court by the short-hand notes.

Rule discharged, with costs; the expense of the short-hand notes to be allowed as part of the costs of the rule. (1)

Solicitors for plaintiffs: *Stibbard, Gibson, & Co.*
Solicitor for defendants: *R. R. Nelson.*

ALLEN *v.* GARBUTT.

Dec. 13.

Q. B. D.

County Court—Admiralty Jurisdiction of—Action for Necessaries—British Ship—Owners domiciled in Great Britain—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *s.* 2—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 2, 3.

7 PD 149
250, 1?

A county court having Admiralty jurisdiction has no greater jurisdiction in respect of a claim for necessaries than that possessed by the Admiralty Division of the High Court, and consequently cannot entertain an action for necessaries supplied to a British ship, the owners of which are domiciled in Great Britain.

The Dowse (Law Rep. 3 A. & E. 135), followed.

The Alina (5 Ex. D. 227), distinguished.

RULE calling upon the judge of the City of London Court and the plaintiff to shew cause why a prohibition should not issue to prohibit the judge from further proceeding with an action in the Court.

The facts and arguments of counsel sufficiently appear from the judgment.

Nov. 8. *Gainsford Bruce*, for the defendant.
Myburgh, for the plaintiff.

Cur. adv. vult.

Dec. 13. The judgment of the Court (MANISTY and BOWEN, JJ.), was delivered by

MANISTY, J. This is a proceeding in rem by action in the City of London Court for necessaries supplied to the ship *Merthyr*.

(1) And see *Ex parte Sawyer, In re Bowden*, 1 Ch. D. 698; *Ashworth* v. *Outram*, 9 Ch. D. 483; *Ex parte Smith*, cor. Bacon, C.J., April 1, 1878.

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On the 8th of November Mr. Gainsford Bruce moved for a prohibition to restrain the judge of that court from proceeding further with the action, on the ground that the ship was a British ship, the owners of which were domiciled in Great Britain, and that consequently, as he contended, the Court had no jurisdiction to entertain the action. Mr. Myburgh shewed cause. It has long been settled law that, independently of statute, the Court of Admiralty has no jurisdiction to entertain a suit for necessaries: *The Neptune* (1); *The Pacific.* (2) By 3 & 4 Vict. c. 65, s. 6, jurisdiction was given to the Court of Admiralty to decide claims for necessaries supplied to any foreign ship or seagoing vessels; but that statute only applied to foreign vessels: *The Ocean Queen.* (3) By s. 5 of the Admiralty Court Act, 1861 (24 Vict. c. 10), it is enacted that the Court of Admiralty shall have jurisdiction over any claims for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. This section applies to British ships only: *The Ella A. Clark.* (4)

By s. 2 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71), her Majesty in Council was empowered to give Admiralty jurisdiction to county courts, and by s. 3 it is enacted that any county court having Admiralty jurisdiction shall have jurisdiction to try and determine, amongst other things, any cause as to a claim for necessaries in which the amount does not exceed 150*l.* By s. 2 of the County Courts Admiralty Jurisdiction Amendment Act, 1869 (32 & 33 Vict. c. 51), any county court having Admiralty jurisdiction is empowered to try and determine causes as to (among other things) any claim arising out of any agreement made in relation to the use or hire of any ship, and by s. 3 of that Act it is enacted that the jurisdiction conferred by that Act and by the Act of 1868 may be exercised either by proceedings in rem or by proceedings in personam. By s. 88 of the Judicature Act, 1873, her Majesty is empowered to confer on

(1) 3 Hagg. Ad. 129; on appeal, 3 Knapp, 94.

(2) B. & L. 243.

(3) 1 W. Rob. 457.

(4) B. & L. 32.

any inferior Court of civil jurisdiction the same jurisdiction in Admiralty as any county court then had or might thereafter have. By virtue of this provision and an Order in Council, the City of London Court has the same Admiralty jurisdiction as a county court.

Mr. Bruce contended that the Act of 1868 did not confer upon a county court a more extensive jurisdiction in the case of a claim for necessaries than that possessed by the Court of Admiralty, and that inasmuch as the Court of Admiralty could not have entertained the present action, neither could the City of London Court entertain it. In support of that contention he cited the case of *The Dowse* (1), decided in 1870, in which it was held that the County Court Admiralty Jurisdiction Act, 1868, does not confer on a county court a more extensive jurisdiction as to a claim for necessaries than that exercised by the Court of Admiralty. That case followed and adopted the principle of the decision of the Court of Common Pleas in the case of *Everard* v. *Kendall*. (2)

Mr. Myburgh, on the part of the plaintiff, admitted that the Court of Admiralty could not have entertained the action in question, but he contended that according to the true construction of the Acts of 1868 and 1869 a county court, and consequently the City of London Court, can entertain it. In support of that contention he cited the case of *The Alina*, in the Court of Appeal (3), decided in February, 1880. Upon referring to that case it will be found that it was a decision as to the effect of the Act of 1869 with reference to an action for a breach of a charter-party, as to which jurisdiction was given to the county court in express terms by s. 2, sub-s. 1, of the Act of 1869. The Court of Appeal followed and adopted the decision of the Privy Council in the case of *Cargo ex Argos* and *The Hewsons* (4), decided in 1872.

These decisions have reference to the construction of the Act of 1869, and do not touch the present question, which depends upon the contruction of the Act of 1868. The case of *The Dowse* (1) is in point as to the construction of the Act of 1868, and we should probably have felt bound to follow it even if we had doubted its

(1) Law Rep. 3 A. & E. 135.
(2) Law Rep. 5 C. P. 428.
(3) 5 Ex. D. 227.
(4) Law Rep. 5 P. C. 134.

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correctness, but we do not entertain any such doubt. There will therefore be a rule absolute for a prohibition.

Rule absolute for prohibition.

Solicitors for plaintiff: *Maples, Teesdale, & Co.*
Solicitors for defendant: *J. A. & H. E. Farnfield.*

Dec. 21.

Q. B. D.

THE QUEEN ON THE PROSECUTION OF THE MAYOR, ALDERMEN, AND BURGESSES OF ST. HELEN'S *v.* GIBBON AND ANOTHER, JUSTICES OF LANCASHIRE.

Justices of the Peace — Interest disqualifying — Urban Sanitary Authority — Municipal Corporation — Summons issued by Member of Corporation.

46 BD 354 355-6

By a local Act for the improvement of a borough the corporation was made the authority for the execution of the Act, with power to direct prosecutions for this purpose. An information for an offence under the Act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice, who was also an alderman and member of the corporation, but came on for hearing before justices, none of whom were connected with the corporation:—

Held, notwithstanding, that such justices could not proceed with the hearing of the summons, for it had been issued by one who was virtually prosecutor.

RULE calling on E. Gibbon and T. Pilkington, justices of Lancashire, to shew cause why a writ of mandamus should not issue commanding them to hear and determine the matter of a summons preferred on behalf of the mayor, aldermen, and burgesses of St. Helen's against one J. Jones under 32 & 33 Vict. c. cxx., s. 197.

It appeared upon affidavit that the borough of St. Helen's was incorporated in 1868, and that by the St. Helen's Improvement Act, 32 & 33 Vict. c. cxx., the corporation was made the local authority for improving and governing the borough, with power to direct any prosecution or proceeding against any person for any offence against the Act, and to appoint such officers for the execution of the Act as they should think reasonable. Sect. 197, for the protection of the markets regulated by the Act, prohibited under a penalty the sale, except in dwelling-places or shops, of certain commodities specified, and s. 404, incorporated the provisions of 11 & 12 Vict. c. 43, relating to the recovery of penalties. By s. 412, penalties imposed under the Act were to be paid to the

corporation. By s. 416, except as otherwise provided, no person was to be disqualified or disabled to act as justice of the peace in any matter arising under the Act by reason of his being a member of the council or any committee thereof.

The borough had no separate commission of the peace, the county justices having concurrent jurisdiction within it, together with the mayor and ex-mayor for the time being, according to 5 & 6 Wm. 4, c. 76.

In May, 1879, an information was laid by the borough surveyor before Joseph Cook, an alderman of the corporation, and also an ex officio justice by reason of his having been the last mayor of the borough, against John Jones, for exposing fish for sale in contravention of the Act. Upon this information a summons was issued by Mr. Cook commanding the defendant to appear and answer the charge at the petty sessions. The defendant appeared at petty sessions in pursuance of this summons. The justices present were not members of the corporation, but ordinary justices for the county at large. It was objected that the information was invalid, as it had been laid before a member of the corporation who was not entitled to receive it, and that the justices in petty sessions had no jurisdiction. This objection was upheld by the justices, who refused to proceed.

Dec. 4, 1879. [Before Cockburn, C.J., and Manisty, J.] No counsel appeared to shew cause.

E. Clarke, in support of the rule. There was nothing to disqualify the justices from proceeding to hear the information. Sect. 416 of the local Act was intended to specially qualify justices in a case like the present. It would be a serious obstacle to the execution not only of the local Act but also of the Public Health Act, 1875, which requires prosecutions to be directed by the local authority, if justices could not receive informations under such Acts by reason of their being also members of the local authority. Signing the information and issuing the summons are only ministerial acts.

[COCKBURN, C.J. Before they allow the summons to issue the justices must be satisfied that they have jurisdiction.]

The justice who issued the summons cannot be said to have

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taken part in the prosecution, and this distinguishes the case from *Reg.* v. *Milledge* (1), where the justices who heard the summons actually took part in the prosecution.

Cur. adv. vult.

Dec. 21, 1880. MANISTY, J., delivered the judgment of the Court.

This rule was argued before the late Lord Chief Justice and myself. The question was whether the justices against whom the rule was obtained were warranted in refusing to proceed with the hearing of a summons which had been issued by a justice who was a member of the municipal corporation on whose behalf the prosecution was directed. [The learned judge stated the facts and proceeded:—] The justices refused to proceed upon the information, upon the ground that it was laid before a justice of the peace who was a member of the corporation, being one of the town council. I think they were right, and that *Reg.* v. *Milledge* (1) governs the case. There is no doubt this distinction between this case and *Reg.* v. *Milledge* (1), that there justices who were members of the town council were present at the hearing of the summons. But it was urged, as in this case, that there was an enactment which enabled justices to act in public health matters, although they were also members of the local authority. The Court, however, held that notwithstanding this qualification the justices could not act in cases where they were virtually prosecutors. In the present case the corporation being entitled to the penalty were the prosecutors, and one of the council must be taken to have acted as a judge in considering the case before granting the summons. The two cases are in principle undistinguishable. This is the case of an information laid by the prosecutors before one of themselves.

The late Lord Chief Justice was of the same opinion when the case was heard, and I have no reason to suppose that he changed it afterwards. The rule must be discharged.

Rule discharged.

Solicitors for prosecution: *Gregory, Rowcliffes, & Rawle, for Brewis, St. Helen's.*

(1) 4 Q. B. D. 332.

[IN THE COURT OF APPEAL.]

1880
Dec. 17.
(C. A.)
Q. B. D.

ROYLE *v.* BUSBY & SON.

Practice—Sheriff's Officer—Abortive Execution—Possession Money—Who liable to pay.

The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of fi. fa. at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—

Held (affirming the judgment of Bowen, J.), that the solicitors were not liable to pay the fees; that the law, apart from a contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied.

Maybery v. *Mansfield* (9 Q. B. 754) followed.

Brewer v. *Jones* (10 Ex. 655) dissented from.

This was an action by an officer of the sheriff of Cheshire against a firm of solicitors, to recover a sum of 28*l.* 11*s.*, alleged to be due from them to the plaintiff, under the following circumstances. On the 31st of July, 1879, the defendants, who had acted as solicitors for the plaintiffs in an action brought by the Stavely Coal and Iron Company against a company of the name of W. & J. Garforth, Limited, in the course of their duty as such solicitors, lodged at the office of the sheriff of Cheshire, for execution, a writ of fieri facias issued on a judgment recovered by the plaintiffs in such action; the defendants, however, gave no instructions as to the employment of any particular bailiff. The sheriff employed the plaintiff to execute the writ. The plaintiff accordingly on the same day, 31st July, entered on the premises of W. & J. Garforth, Limited, and seized their goods.

On the 26th of July, 1879, a petition to wind up W. & J. Garforth, Limited, had been presented in the Chancery Division of the High Court. But at the time of the above-mentioned seizure, the plaintiff had no notice of such petition.

On the 7th of August, an order was made by the Exchequer

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Division staying all further proceedings in the action of the *Stavely Coal and Iron Company* v. *W. & J. Garforth* until the petition should be disposed of, and a copy of such order was on the following day, August 8th, served on the plaintiff. On the 26th of August, the plaintiff being in doubt whether he ought, under the circumstances, to remain in possession or withdraw, wrote to the defendants for instructions, but to that letter he received no reply.

On the 7th of November, an order was made by the Chancery Division, ordering W. & J. Garforth, Limited, to be wound up.

The plaintiff, having received no instructions to withdraw, continued in possession until the 17th of November, when he was served with a copy of the winding-up order; he thereupon withdrew, without having sold any of the goods seized under the fi. fa. The plaintiff then sued the defendants for his levy fee, and for 110 days' possession money in respect of possession, from the 31st of July to the 17th of November.

The action was tried at the Manchester Spring Assizes, 1880, before Bowen, J., without a jury.

His Lordship, on further consideration, gave judgment for the defendants, on the ground that, the execution having proved abortive, no beneficial service had been rendered by the plaintiff.

The plaintiff appealed.

Bigham, for the plaintiff. Two questions arise for decision in this case. The first is whether the action is brought between the right parties, whether, that is to say, the proper person to sue in such a case is the bailiff who did the work, or the sheriff who employed him, and further, whether the proper person to be sued is the execution creditor or his solicitor.

The cases of *Foster* v. *Blakelock* (1), and *Walbank* v. *Quarterman* (2), are authorities for the proposition that the solicitor of the execution creditor is the proper person to be sued, though it must be admitted that they, to a certain extent, turned on the fact of the selection of a particular bailiff by the defendant. The case of *Brewer* v. *Jones* (3), however, went a step further. There the

(1) 5 B. & C. 328. (2) 3 C. B. 94.
(3) 10 Ex. 655.

bailiff was not specially selected by the solicitor, but the solicitor was, nevertheless, held liable. The solicitor has no authority to pledge his clients' credit; he then is the proper person to be sued. But is the bailiff the right person to sue? It is contended that a contract of employment arises between the solicitor and the bailiff from the mere fact of the lodging by the former of the writ of fi. fa. at the sheriff's office, with a request that it should be executed; and that *Brewer* v. *Jones* (1) is an authority that the sheriff is the agent of the solicitor to select the bailiff.

The second question, which is the only one which was argued before Bowen, J., is whether the plaintiff is entitled to his fees notwithstanding that the execution proved abortive. The learned judge decided this question in the defendants' favour on the authority of *Cole* v. *Terry* (2) and *Newman* v. *Merriman*. (3) But those were cases in which the goods seized by the sheriff's officer were not the goods of the judgment debtor at all, and therefore have no application to such a case as the present, in which the goods seized were at the date of the seizure the property of the judgment debtors, W. & J. Garforth, Limited, the winding-up order not having then been made, and the goods consequently not having at that time vested in the official liquidator. It is true that when once the winding-up order was made, the execution was void to all intents and purposes by virtue of s. 163 of the Companies Act, 1862. But until that event happened there was always a chance of the petition being dismissed, and therefore the levy by the plaintiff and his remaining in possession, at all events up to the date of the winding-up order, were beneficial to the defendants in this sense, that they conferred on them the chance of reaping the fruits of their fi. fa. The way in which events subsequently turned out cannot affect the question. The plaintiff therefore contends that the cases relied on by Bowen, J., do not apply, and that even if they do he was wrong in holding that the services rendered were not beneficial.

Henn Collins, for the defendants. First, as to the parties, The cases of *Maybery* v. *Mansfield* (4) and *Seal* v. *Hudson* (5) are

(1) 10 Ex. 655.
(2) 5 L. T. (N.S.) 347.
(3) 26 L. T. (N.S.) 397.
(4) 9 Q. B. 754.
(5) 4 D. & L. 760.

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directly in point in the defendants' favour, and shew that an attorney who does nothing more than lodge a writ for execution at the sheriff's office is not personally liable for the fees. The only authority cited against the defendants is *Brewer* v. *Jones*. (1) But that case purported to be decided on the authority of *Walbank* v. *Quarterman* (2), in which case the attorney himself engaged the plaintiff. *Brewer* v. *Jones* (1) must be regarded as wrongly decided.

As to the second question, the defendants contend that there never was any real possibility of benefit; the possibility of the petition being dismissed was so remote as not to amount to a practical possibility at all. But even if there was a possibility, the risk of its ultimately failing should be run by the sheriff's officer, not by the defendants.

Bigham was heard in reply.

LORD SELBORNE, L.C. This appeal raises the question whether a sheriff's officer can maintain an action for his fees and possession money against the solicitor of an execution creditor, where the solicitor has done nothing more than deliver a writ of fieri facias to the sheriff for execution?

It is not contended that the law, apart from contract (express or implied), casts any such liability upon the solicitor. The sheriff is an officer of the law, with subordinate officers of his own appointment, for whose acts and defaults he is responsible. He and his officers are, by statute, entitled to certain fees, but the statute does not say that the solicitor of the execution creditor is to pay them; and, whatever the remedy for them may be, when the proceeds of an execution are insufficient, there is no reasonable ground on which it can be implied that the solicitor, who, in the proper and ordinary course of his duty to his client, simply delivers a writ to the sheriff for execution, thereby enters into a personal contract to pay such fees.

It was held, in several cases which preceded *Brewer* v. *Jones* (1), that a request by the solicitor that a particular bailiff might be employed to execute the writ was evidence of a contract by him to pay that bailiff's fees and possession money; and in one of

(1) 10 Ex. 655. (2) 3 C. B. 94.

those cases, *Foster* v. *Blakelock* (1), the distinction was expressly pointed out by Mr. Justice Bayley between such a state of circumstances and that which exists where the solicitor merely delivers the writ for execution to the sheriff. *Maybery* v. *Mansfield* (2) and *Seal* v. *Hudson* (3) were cases in which there was in fact nothing more than the delivery of the writ to the sheriff, and in both those cases it was held that there was no evidence of any contract, and that the solicitor was not liable.

In *Brewer* v. *Jones* (4) the Court of Exchequer arrived at an opposite conclusion, upon the authority (as it considered) of *Walbank* v. *Quarterman* (5); and it is remarkable that the judges who pronounced that decision themselves regarded it as at variance with sound principle, and only justified it by that (supposed) precedent. *Walbank* v. *Quarterman* (5), however, was decided upon the authority of *Foster* v. *Blakelock* (1), in which the distinction already noticed was pointed out, and it was determined upon a state of facts similar to that which existed in *Foster* v. *Blakelock*. (1) It is therefore no precedent at all for *Brewer* v. *Jones* (4), which thus stands self condemned as against sound principle, and is opposed to the judgment of a court of co-ordinate jurisdiction, and of equal authority, in *Maybery* v. *Mansfield*. (2) We have no hesitation in following *Maybery* v. *Mansfield* (2) in preference to *Brewer* v. *Jones*. (4)

This point (which, on account of the state of authority, was not argued before Bowen, J.), is sufficient to dispose of the present appeal against the appellant. But it would not be right to pass over without notice the ground on which the judgment of that learned judge proceeded, which was founded upon the opinions expressed by Bramwell and Martin, BB., in *Newman* v. *Merriman* (6), to the effect that a sheriff's officer cannot recover his fees from a solicitor when the execution has proved practically abortive and unfruitful. Those opinions were expressed in a case in which the goods seized were not the property of the judgment debtor, and I think it would be an error (on the assumption of a contract by the solicitor to pay the sheriff's officer what he was

(1) 5 B. & C. 328.
(2) 9 Q. B. 754.
(3) 4 D. & L. 760.
(4) 10 Ex. 655.
(5) 3 C. B. 94.
(6) 26 L. T. (N.S.) 39.

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lawfully entitled to receive) to extend them to any case of a different kind. In the present case the judgment debtor was a joint stock company, against which there was pending, when the execution was issued, a petition to wind up, on which a winding-up order was afterwards made. The effect of that winding-up order was to defeat the execution, by the operation of s. 163 of the Companies Act, 1862. But I am not at all satisfied that it was the duty, or that it would have been consistent with the duty, of the sheriff's officer to withdraw from possession, without instructions from the execution creditor, until it was certain that such order, whereby the title of the judgment debtor to the goods might be displaced, would be made; or that, under such circumstances, he would lose his right to recover his lawful fees from any person, solicitor or not, who might have contracted to pay them.

BAGGALLAY, L.J. I am of the same opinion. I confess I should hardly feel inclined to draw the conclusion which was drawn by Bowen, J., that there had been no beneficial service by the plaintiff. The first point, however, is sufficient to decide the case.

BRETT, L.J. I agree on the first point; on the second I express no opinion.

Judgment for the defendants.

Solicitors for plaintiff: *Chester & Co.*
Solicitors for defendants: *Palmer, Bull, & Fryer.*

[IN THE COURT OF APPEAL.]

1880
Dec. 14.

(C. A.)
Ex. D.

THE ATTORNEY GENERAL *v.* DOWLING.

Revenue—Succession Duty—Predecessor—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.

A lunatic was tenant in tail in possession of land with remainder to his younger brother R. and his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure a debt of 124,000*l.* which was more than the fee simple value of the land, so that he had no beneficial interest in the equity of redemption. His sister D. married, and by her marriage settlement made before such marriage her estate in remainder was settled to the use of herself for life, with remainder to the use of the first and other sons of such marriage. The defendant was the only son of that marriage. For the benefit of all parties a family arrangement was made with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), in pursuance of which R. and his sister D. and the mortgagees all joined in deeds of settlement, whereby the land was conveyed to trustees in fee simple, subject to the estate tail of the lunatic, but discharged from the mortgage and from the equity of redemption of R. upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage, and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic D. became tenant for life in possession and upon her death the defendant, as her son, became tenant in tail in possession :—

Held, that the defendant derived his interest as successor from his mother D. and not from his uncle R. as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent., and not at 3*l.* per cent.

APPEAL from a decision of the Exchequer Division in favour of the defendant on an information claiming succession duty. (1)

The facts are fully stated in the report of the case in the Exchequer Division. It is sufficient here to say that upon the death of Edward Blewitt in 1832, his son Edward Francis was tenant in tail in possession of the Llantarnam Abbey estate, with remainder to his brother Reginald James and his sister Frances Mary Ann successively in tail. Edward Francis was by inquisition found a lunatic, and afterwards in May, 1834, Reginald James converted his estate tail into a base fee, and mortgaged his interest to the Monmouthshire and Glamorganshire Banking Company as security for 124,000*l.* with a covenant to convey the

(1) 5 Ex. D. 139.

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fee simple when able to do so. The fee simple of the estate was not then worth the amount of such mortgage charge so that Reginald's equity of redemption was valueless. In June, 1834, Frances Mary Ann married Richard Brinsley Dowling, and by a marriage settlement executed previously and when she was of full age she and her said husband covenanted to settle any real estate which she should acquire to her separate use for her life, and after her decease to her said husband's use for life, with remainder to the use of the first and other sons of the marriage successively in tail male. The defendant was the only son of that marriage. In 1855, for the benefit of all parties, a family arrangement was made by which with the consent of the Lord Chancellor (as protector of the settlement, and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), and with the concurrence also of Reginald James Blewitt, Frances Mary Ann Dowling, and her husband, and the mortgagees, who all joined as parties to the deeds, the Llantarnam Abbey estate was conveyed to trustees in fee simple absolute, subject to the estate tail of the lunatic, but discharged from the mortgage, and from the equity of redemption of Reginald James Blewitt, upon trust after the determination of the estate of the lunatic, by sale or mortgage to raise 37,000*l.* and to stand possessed thereof for the said mortgagees, and subject thereto to convey the land to trustees on trust during the life of the said Frances Mary Ann Dowling for her separate use, with remainder to the use of her husband during his life, with remainder to the use of the sons of the said F. M. A. Dowling by her husband R. B. Dowling successively in tail male, with remainder over. At the time of making this arrangement Reginald J. Blewitt was a married man of about fifty-three, and without issue. The lunatic Edward Francis died in 1868 unmarried, and the said F. M. A. Dowling then entered into possession of the estate. The 37,000*l.* was duly raised and paid to the mortgagees. Richard B. Dowling died in 1859, and his wife the said F. M. A. Dowling died in 1875, whereupon the defendant as her son entered into possession of the estate.

The question was whether defendant was chargeable with duty at 3*l.* per cent. as contended for on behalf of the Crown, as on a succession derived from his uncle the said Reginald James

Blewitt as predecessor, or with a duty only of 1*l.* per cent. as on a succession from his mother as predecessor.

W. W. Karslake (*Sir H. Giffard, Q.C.*, with him), for the Crown, the appellant, argued, as in the Court below, that the estate came from Reginald J. Blewitt by whom the re-settlement was effected, and that the consent given by his sister F. M. A. Dowling was no more to be regarded, in ascertaining from whom the succession was derived, than the consent to a disentailing deed given by an ordinary protector of the settlement, or in Scotland by the next heirs in tail.

The following cases were cited: *Lord Advocate* v. *Earl of Glasgow* (1); *Fryer* v. *Morland* (2); *Attorney General* v. *Lord Braybrooke*. (3)

Davey, Q.C., and *Jason Smith*, for the defendant, were not called upon.

LORD SELBORNE, L.C. Mr. Karslake's argument is founded upon principles which have been perfectly well settled and established, since the case of *Attorney General* v. *Lord Braybrooke* (3) in the House of Lords, which are that when there is a family arrangement for a re-settlement of the estate by which the tenant for life takes back his life estate, and the powers he had before, then everything else under the settlement must necessarily come out of the rest of the estate which belonged to the tenant in tail, and therefore the succession must be derived from the tenant in tail. I agree that, in a case of that sort, it would be perfectly idle to say that because the tenant for life, the father, consented as protector of the settlement to barring the entail, and because he might bargain for the giving of that consent, he became the purchaser of the interest of his son the tenant in tail, and was to be regarded as a predecessor under the Succession Duty Act. But this case is wholly different in all its circumstances. In this case the remainderman in tail had acquired a base fee. He had encumbered that base fee to much more than the whole value of the estate, at all events to much more than any value which could possibly

(1) 12 Scottish Law Reporter, 215.
(2) 3 Ch. D. 675.
(3) 9 H. L. C. 150.

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have been obtained for his interest while remaining a base fee. The person who would have been protector of the settlement was a lunatic, and therefore the protector of the settlement was the Lord Chancellor. The person entitled in remainder, who had acquired the base fee and so charged it beyond its value, had no issue and no immediate prospect of issue. The next person entitled in remainder was a married lady, who before her marriage, being of full age, had bound herself by articles of ante-nuptial settlement, and had therefore in equity turned her remainder into a remainder to herself for life with the inheritance to her children, whose succession is now in question. Under that marriage settlement if they are to be regarded, as I think they are, as taking under it, then it is clear that the mother is the predecessor and not anybody else. Then are they to be regarded as taking under that marriage settlement?

Now the facts are these. The Lord Chancellor, feeling that it was not right in his judgment to use the power vested in a public officer for the destruction of the expectations of those who had vested interests in those expectations, would not consent to allow the remainders expectant on the base fee to be barred, unless upon terms which substantially preserved intact the beneficial interest of the persons entitled under the marriage settlement. Under those circumstances a family arrangement took place. There were risks on both sides. If Reginald Blewitt, who had mortgaged his whole interest, as I have said, to the Monmouthshire Banking Company, had happened to lose his wife and to have afterwards married and had issue, then as long as that issue continued the succession of Mrs. Dowling and her children would of course be kept out. That was one chance against which it was their interest to obtain protection. Another chance was that Reginald Blewitt might have survived the lunatic, in which case the consent of the Lord Chancellor to a deed barring the remainder would no longer have been necessary, and the creditors, the Monmouthshire Banking Company, might have required, I have no doubt, Reginald Blewitt by virtue of the securities he had given to them at once to convert the base fee into a fee simple. Those were risks, and substantial risks, to Mrs. Dowling and her children. On the other hand there was the risk (I will not

say to Reginald Blewitt, for he had really ceased to have any beneficial interest in the property), but to his creditors the Monmouthshire Banking Company, that he, Reginald, might die before his brother the lunatic and without leaving issue, in which case they would not get a single shilling. Then a family arrangement was made, and it appears to me that it is perfectly true, as the Judges in the Court below decided, that on both sides value was given for that arrangement. The interest of both was reduced to a practical certainty, and that of Reginald Blewitt was valued between the parties at 37,000*l.* I regard that as representing his interest. But that never could have been obtained without the consent of the other parties, and the Lord Chancellor never would have allowed it without that consent and without being satisfied that their interests were being protected. And the terms on which he allowed it were, that when that value put upon Reginald's estate should be raised out of the property by means of the disentailing assurance for the benefit of his creditors, they (the Dowlings) should have made sure and safe to them that estate in remainder expectant on his estate, which was precarious under the circumstances which then existed. In my opinion, the children after that arrangement continued to take under the marriage settlement exactly as they would have taken if Reginald Blewitt had died without having done anything to enlarge the base fee into a fee simple, and I am convinced the Lord Chancellor never would have consented to the disentailing assurance upon any other terms. I think, therefore, the judgment was perfectly correct, and that the appeal must be dismissed.

BAGGALLAY and BRETT, L.JJ., concurred.

Judgment affirmed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *R. S. Taylor & Son.*

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Nov. 29.
C. P. D.

GRAINGER, Appellant; AYNSLEY & Co., Respondents.
BROMLEY, Appellant; TAMS, Respondent.

Employers and Workmen Act, 1875 (38 & 39 *Vict. c.* 90), *ss.* 4, 10—"*Workman*"—*Potter's Printer—Breach of his Contract through Strike of Assistants employed by him.*

By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, "a dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such Court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction" limited to 10*l*. By s. 10 "In this Act the expression 'workman,' . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . . has entered into or works under a contract with an employer, whether the contract be . . . a contract of service or a contract personally to execute any work or labour."

The expression "court of summary jurisdiction" means (inter alia) a stipendiary magistrate:—

Held, that a potter's printer, under a contract with his employers to do work in which he was assisted by "transferrers" whom he himself engaged and paid, was a "workman" within the Act, and liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers, caused by his transferrers' refusal to do the work, although he was ready and willing to do it.

GRAINGER *v.* AYNSLEY & Co.

Case stated by the stipendiary magistrate for the borough of Stoke-upon-Trent under 20 & 21 Vict. c. 43.

On the hearing of a plaint commenced by the respondents, earthenware manufacturers, against the appellant under 38 & 39 Vict. c. 90 (the Employers and Workmen Act, 1875), charging that the appellant being under a contract to serve the respondents, as a potter's printer, did from the 15th of December, 1879, until the 10th of January, 1880, absent himself from the respondent's employment, whereby the respondents sustained damages to the extent of 5*l*., the magistrate ordered the appellant to pay to the respondents the sum of 20*s*. as damages and the costs.

It appeared that the appellant was, at the time when he was alleged to have absented himself, in the employ of the respondents, as a potter's printer, overlooker, and mixer, he having, besides attending to his own work, to overlook and superintend

the work of the other potters' printers in the employ of the respondents.

The custom in the potting trade is to contract to work from Martinmas to Martinmas, subject to a month's notice on either side for determining the contract. The appellant had been in the employ of the respondents about two years prior to Martinmas, 1879.

Prior to Martinmas 1879, the respondents put up notices on their works that from the Martinmas then approaching they should make a reduction in workmen's prices of 10 per cent.

No fresh arrangement or contract was entered into by the appellant, but he continued to work after Martinmas, 1879, on the same terms as before.

The question of a reduction of workmen's wages was submitted to arbitration, and some time after Martinmas the arbitrator gave his award reducing wages $8\frac{1}{4}$ per cent.

The appellant went on working after the reduction in wages without any fresh arrangement until the 15th of December, 1879, the day on which he was alleged to have absented himself.

It was asserted by the appellant that in the potting trade it is impossible for the printer to do his work without the aid of another person called a transferrer. The transferrer is generally a woman, in most cases, as in this case especially, the printer finds his own transferrer.

On the said 15th of December, 1879, the transferrer, who had been engaged by the appellant, and who worked with him, together with the transferrers of the other printers in the employ of the respondents, having previously given a week's notice declining to work any longer at the reduced rate of wages, went out on strike. The appellant regularly each day presented himself at the works of the respondents ready to work, but was unable to do so in consequence of the strike of the transferrers.

The appellant within the time in which he was charged in the plaint, viz., on the 7th of January, 1880, commenced to work again, the respondents having found him transferrers.

The question of liability was argued. [The contentions on either side were set out in the case.] Seeing that the appellant had engaged personally to work for the respondents, the magistrate

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was of opinion that the appellant was a workman within the meaning of s. 10 of the Employers and Workmen's Act, 1875, and that there was an implied valid contract to work, subject to a month's notice being given on either side; that the appellant in engaging his transferrers made no arrangement with them as to the notice to be given by either party to determine the engagement which otherwise according to the custom is determined without any notice; and that the question for the magistrate to consider was who was to suffer for the loss occasioned by the transferrers leaving their work, the appellant or respondents. And the magistrate held that, as the appellant had entered into a contract with the respondents to do certain work on the terms of a month's notice, and had entered into a contract with the transferrers on whom he was, according to his own statement, dependent, that they should work for and with him on the terms that they might terminate their engagement without notice, the injury to the respondents was wholly caused by the appellant in not taking care when he engaged his transferrers to stipulate for the same length of notice from them as he himself was under from the respondents, and the magistrate therefore awarded damages and costs to be paid to them by the appellant.

The questions for the opinion of the Court were, whether the appellant was a workman within the meaning of the Employers and Workmen Act, 1875, and if so, whether there was an implied valid contract to work from Martinmas, 1879, to Martinmas, 1880, subject to a monthly notice. And if so, whether as the appellant had engaged his own transferrers, and would have made his own arrangements with them as to notice, he was liable in damages for a breach of contract caused by the transferrer's refusal to work, although he the appellant was willing to do so?

Nov. 12. *Hopwood, Q.C.* (*R. S. Wright,* with him), for the appellant. First. There was no valid contract between the appellant and respondents. It should have been in writing, as it could not be performed within twelve months, for it began before Martinmas: *Banks* v. *Crossland* (1); *Dobson* v. *Collis.* (2)

[LINDLEY, J. The contract was a hiring from Martinmas to

(1) Law Rep. 10 Q. B. 97. (2) 25 L. J. (Ex.) 267.

Martinmas, subject to determination at any time on the expiration of a month's notice.]

Secondly. The plaint is informal, and was not proved. The charge is that the appellant absented himself from the respondents' employment, whereas it is found that he did not absent himself, but presented himself daily at the works.

There was no evidence of any binding contract to find transferrers. But even if there was such evidence the case is not within the Act. The jurisdiction given by s. 4 is small, and limited to a "dispute under this Act between an employer and a workman." By s. 10 "workman" is defined as a person engaged in manual labour, who works under a "contract of service or a contract personally to execute any work or labour." Those terms shew that the Act applies merely to individual service, and that the legislature meant only to deal with cases where the workman was subject to imprisonment. The appellant is not such workman. He is a contractor; but does not guarantee the attendance of tranferrers. He did not contract "personally to execute," the work. The failure of the transferrers to attend was caused by the general reduction of wages by the employers, and not by any default of the appellant.

Rose, for the respondents. The plaint was sufficient. No particular form of complaint is prescribed by the Rules of 1875, made pursuant to s. 9 of 38 & 39 Vict. c. 90. By 11 & 12 Vict. c. 43, s. 1, no objection to the form of the summons could be taken. None was taken below, nor is any such objection a point in the case.

There is a contract and a breach of it. So an action could clearly be maintained in the superior or county courts for damages. It would, of course, be no answer to such action for the defendant to say that his transferrers failed him. He should have provided against such a contingency: Chitty on Contracts, 11th ed. p. 667. Civil jurisdiction over such contracts has now also been given to justices by the Employers and Workmen Act, 1875. Workmen were formerly subject to summary imprisonment for breach of contract. This hardship was partially removed by the Master and Servant Act, 1867, 30 & 31 Vict. c. 141, and is now more effectually remedied by 38 & 39 Vict. c. 90, which substitutes

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for the phrase "master and servant" that of "employers and workmen," enlarges the powers of county courts in respect of their disputes, and gives justices a limited civil jurisdiction. It was convenient to give justices such jurisdiction for their petty sessions are more frequent and in more places than the county courts. The limit is the amount of 10*l.*, but that practically comprises the amount of any dispute likely to arise between employers and workmen the majority of whom are paid daily or weekly wages. So the jurisdiction is in fact extensive. The legislature could not have intended to exclude from the benefit of the Act the large classes of workmen who are aided in their work by assistants whom they themselves engage and pay as in the present case. Skilful artisans in a number of different trades employ subordinates. Here no doubt the potter's printer could, with his own hands, transfer on to the earthenware the impressions he prints for it; for the sake of speed and covenience he finds and pays women to aid him, but he is nevertheless engaged in "manual labour" under a "contract of service" or a "contract personally to execute" the work mentioned in his agreement. The word "personally" was probably inserted because, as it did not appear in the definition clause, s. 2 of the preceding Act, the terms of that clause might have applied even to contractors in the popular sense of the word. The object of s. 10 is to indicate the labouring classes as distinguished from domestic servants, clerks, shopmen, and others. Hence the use of the words "manual labour."

Hopwood, Q.C., replied.

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THIS case was of a similar kind. The terms of the contract, however, appeared in a written "Memorandum made on the 21st of November, 1879, arranged with Thomas Bromley, printer, at the following prices: Common printed at 4¾*d.*, best burner-ware at 5¼*d.*: he will find his own attendance. The above prices are for the year, that is, the present date of the 11th of November, 1880," signed by the mark of the appellant. The nature of the transferrer's work was also described, viz., that the work undertaken by the appellant necessitated the employment by the

appellant of one or more person or persons to cut out the patterns as they were printed on paper by the appellant, and to transfer them to the ware, and that such persons were the attendance referred to in the contract of service, and their wages were paid by the appellant.

Hopwood, Q.C. (*C. J. Darling*, with him), for the appellant.
Rose, for the respondent.

LINDLEY, J. I think that our judgment should be for the respondents and that the view taken by the magistrate is correct. The questions submitted to us are, for all practical purposes, the same in both cases. The question really is, whether the dispute which arose and is stated in the cases is a "dispute," within the Act, and whether the disputants are persons who come within the terms of the Act. For the purpose of determining this question, it is necessary to consider what is a "dispute" and who are the disputants to whom the Act refers. It would be scarcely necessary, as the cases are like each other, to refer to the facts further than to state that they are of this nature, viz., the employers are persons engaged in the manufacture of pottery, and the employed are persons employed by them to do certain work which is manual labour, and which they have to do partly by themselves and partly by other persons whom they provide and pay. The dispute arose thus: The appellants—workmen, as I will, for the moment at least, call them,—in both cases having entered into an engagement to perform the work, were ready to perform the work so far as they personally were concerned; they attended each day at the manufactory and were willing to do all they could, but the persons employed by them, viz., their own immediate servants whom by custom they had engaged to serve them had struck, and so the employed, the appellants, could not do the work, their inability arising from the strike and also from their not being able to get other transferrers, as they might have done if they liked. So the dispute arose. A dispute under this Act is referred to by s. 3, in these words: "In any proceeding before a county court in relation to any dispute between an employer and a workman arising out of, or incidental to, their relation as such (which

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dispute is hereinafter referred to as a dispute under the Act)," the Court may exercise certain powers. Was this a dispute of that character? Assuming for the moment that the appellants are workmen, I can hardly see on what principle it could be said not to be such a dispute. It was a dispute between an "employer and a workman" of some kind. It was a dispute "arising out of or incidental to their relation as such," that is to say, it arose out of the fact that the workman could not do the work he had undertaken to do. It appears to me impossible to say that is not a dispute fully and fairly within the words of the section. But it is said the man was not a "workman" and that that word does not extend to anybody who, by custom or otherwise, has to employ others to work for him in doing his work. I do not say that it does apply to persons under sub-contracts, as if one employs a man to build anything and he employs another to build it. But it is hard to say that a man employed to do work manually, who employs another to do work which, if skilful and active enough, he could do himself, is not a "workman" within the meaning of the Act. By s. 10, "In this Act the expression 'workman,' does not include a domestic or menial servant, but, save as aforesaid, means any person who being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour . . . . has entered into or works under a contract with an employer, whether the contract be . . . . a contract of service or a contract personally to execute any work or labour." Scanning that language with all care, I cannot say what part of it is inapplicable to the appellants. They are employed, they are "engaged in manual labour," they have entered into and work under "a contract of service, or a contract personally to execute work or labour." What the exact meaning of the distinction between "contract of service" and "contract personally to execute any work or labour," may be is not quite easy to see. The words may refer to a "contract" to serve, say for a month, as distinguished from a "contract" to execute any work or labour, say to dig a drain. That may or may not be the distinction. But I find nothing to shew that the appellants are not workmen within s. 10. Further, I will add there are plain cases when a person employed to do other work would clearly not be within the

section. "Manual labour" is the keynote to it, and if so, the appellants are within it. I should not be inclined to put a narrow meaning on a remedial Act of Parliament. But I think, whatever doubt there may be in other cases, these are clearly within the Act. We were invited to consider the form of plaint, but that is not the question put to us.

LOPES, J. The two cases are substantially the same. The points, arising in both, seems to me to be these:

First, are the disputes within the Act, and, secondly, is the appellant in each case a "workman" within the Act? I do not desire to say anything on the first point. Whether the "dispute" is not within the Act has scarcely been seriously contested, and I quite agree with what my Brother Lindley has said. The more material point is, are the appellants workmen within the Act? It has been contended that the result of s. 10, the definition clause, is, that the Act only applies to a case where the work is to be done personally by the person employed, and is not to apply to cases where he calls in the assistance of another, for example, that the Act would not apply to a case where a bricklayer employed to do repairs has to be assisted by a hodman. It is said that in such case it is not a contract personally to execute any work. I think that is too narrow a construction of the Act. I wish to say nothing about cases where a workman employs another under a separate contract. That is a different case. The two phrases in sect. 10 are "contract of service," or "contract personally to execute any work or labour." I should say that a contract of service is when a man is employed, say, as farm labourer, for three months or one year, and that the other words "contract personally to execute any work or labour" apply to cases where a man is employed to do any specific work or labour. I think that the magistrate was right, and his decision should be affirmed.

Judgment for the respondents.

Solicitors for appellant Grainger: *Llewellyn & Ackrill.*
Solicitors for appellant Bromley: *Purkiss & Perry, for Sword.*
Solicitor for respondents: *Welch.*

1880
Dec. 18.

(C. A.)
C. P. D.

[IN THE COURT OF APPEAL.]

MILLINGTON *v.* LORING.

Practice—Pleading—Breach of Promise of Marriage—Special Damage—Matter of Aggravation—Averment of—Rules of Court, 1875, *Order XIX., rule* 4; *Order XXVII., rule* 1.

A statement of claim, after alleging a promise by the defendant to marry the plaintiff, went on to allege in paragraph 4, that, "the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease." It then alleged a breach of the said promise. An order having been made at chambers, to strike out paragraph 4 of the claim:—

Held, reversing the decision of the Common Pleas Division, that the order was wrongly made, and upon two grounds; first, that the facts alleged in the paragraph complained of, were "material facts" within the meaning of Order XIX., rule 4, and as such were properly pleadable; and secondly, that, even if they were not, the Court had no power to strike the paragraph out, the statements therein neither being scandalous nor tending to prejudice or embarrass the fair trial of the action within the meaning of Order XXVII., rule 1.

STATEMENT of claim alleged a promise by the defendant to marry the plaintiff.

Paragraph 4: That the plaintiff relying upon the agreement permitted the defendant to debauch and carnally know her, whereby the defendant infected the plaintiff with a venereal disease.

Paragraph 5 alleged a breach of the promise of marriage.

The defendant applied at chambers for an order to strike out or amend paragraph 4 of the statement of claim. The master made no order. On appeal, Hawkins, J., ordered the paragraph to be struck out.

The plaintiff appealed.

Dec. 7, 1880. *Somervell*, for the plaintiff. Paragraph 4 should be allowed. Seduction is matter of aggravation in actions for breach of promise of marriage: *Berry* v. *Da Costa* (1), by reason of the plaintiff's "prospects of marrying another being materially lessened:" per Willes, J. (2). And matters of aggravation of damage ought to be set out on the pleadings: *Newman* v. *Smith* (3); Mayne on Damages, 3rd ed. 480; *Bracegirdle* v.

(1) Law Rep. 1 C. P. 331. (2) Law Rep. 1 C. P. 331, at p. 333.
(3) Salk. 642.

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Orford. (1) The seduction and infection are "material facts on which the party pleading relies," and therefore the statement of claim must contain them: Order XIX., rule 4. If not pleaded, evidence given of them at the trial would be a surprise to the defendant, and he might object to it on that ground.

[DENMAN, J. Could you allege the amount of means of the defendant in the claim?]

Perhaps not.

[LINDLEY, J. Of course, if you allege the fact of seduction and infection, the defendant would be able to set out matters to meet it which would cause scandalous pleading.]

But not such as should be struck out under Order XXVII., rule 1. This paragraph cannot "embarrass" the defendant, nor "prejudice the fair trial," for the fact of the seduction would be opened to the jury at the outset, as *Berry* v. *Da Costa* (2) shews it may be given in evidence.

[DENMAN, J. The seduction was alleged by the declaration in *Berry* v. *Da Costa* (2), as I find from the Weekly Reporter. (3) But perhaps no objection was made to it.]

Or it was regarded as proper pleading. The defendant should be thankful for the information the plaintiff gives him of what she means to prove at the trial.

F. O. Crump, for the defendant. The declaration in *Berry* v. *Da Costa* (3) ought to have been, but happened not to be, objected to. That case is no decision on the pleading point. It decides only that the evidence of seduction is admissible at the trial. The defendant knowing the facts of the case, does not want the information in paragraph 4. It "embarrasses" him. He is left in doubt whether the action is for breach of promise of marriage, or, indirectly, for seduction. If he pleads to the seduction the issue on it must go to the jury, although the plaintiff herself cannot in law maintain an action for it. The statement is "scandalous" within the meaning of the rule.

DENMAN, J. I am of opinion that the decision of Hawkins, J., was right. I am not at all prepared to say that I do

(1) 2 M. & S. 77. (2) Law Rep. 1 C. P. 331.
(3) 14 W. R. 279.

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not think Order XIX., rule 4, applies and renders it improper to state on the face of the statement of claim such facts as those in paragraph 4, because that rule prescribes that every pleading shall contain a statement of "the material facts on which the party pleading relies; but not the evidence by which they are to be proved," and I have more than a doubt whether the facts in paragraph 4 are not merely evidence of facts, and I have great doubts whether they are "material facts." I am inclined to think that, primâ facie, the order was intended to apply to such facts as are material to the cause of action; if the action is one which cannot be supported without special damage, then of course a statement shewing the special damage would be of material facts, but if the action be one which can be supported without special damage then it appears to me that, primâ facie at least, the rule does not apply to a mere statement with respect to the amount of damages. Damages could always be proved where special damage was not required to be alleged, without any allegation of those facts on the pleadings. In *Berry* v. *Da Costa* (1) the Court went so far as to hold, and Mr. Crump admits, that evidence may be given of the facts stated in this claim, but it seems to me that they are merely evidence, and that it is not necessary to set them out as material facts in an action for breach of promise of marriage. In some cases the Courts have no doubt held that where the character of a trespass may be materially altered in intensity by the mode and circumstances in which the damage for which the action of trespass is brought was done, those matters of aggravation must be stated so as to give the defendant an opportunity of meeting them; and it might be held, although I can find no authority for it, that in the peculiar action for breach of promise of marriage, which though an action of contract in form has some of the incidents of an action of tort, the principle might also apply. But, on full consideration, I doubt whether it would be so held, and whether it would not be decided under Order XIX., rule 4, that the allegation in question violated the rule as not being a concise statement of the material facts, but a statement introducing evidence tending to swell damages. It is, however, unnecessary to pronounce any final decision on that point, because

(1) Law Rep. 1 C. P. 331.

I am clearly of opinion that, having regard to the nature of the allegations in paragraph 4, they are allegations which, if not "scandalous" under the circumstances, at least "tend to prejudice" and "embarrass . . . the fair trial of the action." It is an action for breach of promise of marriage, and to import into it this statement of seduction to which the plaintiff herself admits she was party, and still more to follow that up with allegations of vile consequences having ensued by reason of the conduct of the parties, and so to thrust against the defendant two actions instead of one, and, under colour of an action for breach of promise, bring an action which could not be brought by herself, is of course "embarrassing the fair trial of the action" of breach of promise. No doubt evidence may be given of the whole conduct of the defendant. But it may happen at the trial that allegations such as these, although made in the first instance, are not insisted on, because the parties, thinking the matter over before the trial, have taken the view that by insisting on them the plaintiff might really diminish and not increase the damages by shewing that she behaved lightly and improperly during the promise of marriage. The two matters alleged are so different, and the allegations in paragraph 4 so tend to prejudice the case from the very opening of the pleadings, and would so greatly embarrass the fair trial of the action, that I think the paragraph ought not to be allowed.

LINDLEY, J. I am of the same opinion. My reason for holding that opinion is, that this is an action of an entirely anomalous kind. As a general principle it appears to me that each party should deal with the other by putting into their respective pleadings everything necessary to constitute the cause of action or the defence; and in many cases it is open to no inconvenience, but it is fair and right that the party should do even a little more; for example, to state in an action for trespass what he intends to rely on by way of aggravation of damage, that is often done. If this were an action for seduction brought by the father, I doubt whether any judge would strike out paragraph 4, for though not essential to the cause of action, it might as well be left in. But this is a case of a totally different kind. Every judge who has tried such an action knows the difficulty of keep-

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ing the matters distinct, and preventing the jury from confusing the two, and if we allowed this pleading that difficulty would be increased tenfold. The learned counsel for the plaintiff says that the defendant would thank her for the information given in paragraph 4. He does not. He knew it perfectly well. It is precisely a case where the defendant is embarrassed, and on that ground alone I am for striking it out. Mr. Somervell says that it is only fair to let the defendant know what is to be proved, so as not to spring it on him at the trial. I feel that, and the question is how to deal with it. One way is to give him notice beforehand that the plaintiff intends to prove the fact of the seduction at the trial. If no such notice were given, it is possible that the learned judge might adjourn the case. Something, of course, ought to be done to avoid taking the defendant by surprise. Under ordinary circumstances, I think, this would be the right course, but this action is entirely anomalous, and under the circumstances I am of opinion that the paragraph ought to be struck out.

The plaintiff appealed.

Dec. 18. *Somervell*, for the plaintiff.
F. O. Crump, for the defendant.

LORD SELBORNE, L.C. We have arrived at a different conclusion from that arrived at by the Court below. Two questions here arise; the first is whether the matters alleged in paragraph 4 were properly pleaded under Order XIX., rule 4; if they were, then the Court was wrong in striking the paragraph out. The rule provides that, "Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies." If those words, "material facts," are to be confined to matters which are material to the cause of action, that is to say, facts which must be proved in order to establish the existence of the cause of action, then no doubt the facts in this paragraph were not properly pleaded. But in my opinion those words are not so confined, and must be taken to include any facts which the party pleading is entitled to prove at the trial. Now

on the trial of an action of breach of promise of marriage the plaintiff is entitled to give evidence of the fact of seduction by the defendant. For that the case of *Berry* v. *Da Costa* (1) is an authority, and with that case I entirely agree. I am also of opinion that the same principle applies to the other allegation in the paragraph, the allegations of the communication of disease. Both these facts then were properly pleaded.

But suppose they were not, then arises the second question: Had the Court, even in such case, any power to strike the paragraph out? The answer to that question depends on Order XXVII., rule 1, which empowers the Court to strike out any matter "which may be scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action." Then are these matters scandalous? I think not within the meaning of that rule. But it is said that they are embarrassing, on the ground that the jury might suppose that they constituted a distinct cause of action. But that is hardly probable, for they will have a judge to direct them, and they are hardly likely to be more misled by the opening of the pleadings than by the opening speech of the plaintiff's counsel who will be entitled to state these facts in his speech.

The only result which, so far as I can see, follows from these facts being stated in the pleadings is one which, so far from being embarrassing or prejudicial to the defendant, is in his favour; it is this, that there is no chance of the defendant being taken by surprise at the trial by having charges sprung upon him of which he had no notice. Assuming that these allegations are untrue, nothing could embarrass the defendant more than to hear of them for the first time at the trial. I think therefore that substantial justice is in favour of allowing them to be pleaded.

BAGGALLAY, L.J. I am of the same opinion. *Berry* v. *Da Costa* (1) is an authority that the fact of seduction may be given in evidence at the trial. That being so, it seems to me to be a "material fact" within Order XIX., rule 4, and as such may be properly introduced into the pleading. The other allegation in the paragraph seems to me to come within the same rule. I agree

(1) Law Rep. 1 C. P. 331.

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also with the Lord Chancellor as to the construction to be put on Order XXVII., rule 1.

BRETT, L.J. I am of opinion that both the matters alleged in this paragraph might be given in evidence at the trial, and on two grounds; in the first place, the plaintiff has been more grievously injured than she would have been by the mere breach, for, to adopt the language of Willes, J., in *Berry* v. *Da Costa* (1), she "returns to her mother's house, not as a virtuous and respected member of the family, but compelled, as it were, to skulk into the home she had made desolate, without daring to lift her eyes to her parents' face." The fact that she is placed in such a position is a matter on which I think the jury should act when assessing the damages. Not only has she lost her marriage in the present instance, but by losing her virtue she has lost any further chance of marriage. In the next place, the contract has been broken in an aggravated manner. The fact of the seduction made it even more incumbent on the defendant, if an honest man, to marry the girl, than if there had been only a promise of marriage not followed by seduction. The same observation applies to the second allegation in the paragraph.

If, then, these matters may be given in evidence at the trial, is it proper to allege them in the pleadings? Now before the Judicature Act they could not properly have been pleaded; then can they be so pleaded under Order XIX. of that Act? I think they can. It is true that they are facts which are not necessary to establish the cause of action, but they are facts on which the plaintiff will rely at the trial. Then, if they are properly pleadable under Order XIX., they cannot be struck out.

But even if they are not properly pleadable under that order, still the defendant fails in showing that the Court has any jurisdiction to strike them out. The Court has no jurisdiction to strike matters out unless they are in breach of Order XXVII. rule 1; that is to say, are scandalous or tend to embarrass, prejudice, or delay the fair trial of the action. The mere fact that these matters state a scandalous fact does not make them scandalous within the meaning of that rule; and if, as is the case, they

(1) Law Rep. 1 C. P. at p. 334.

may be given in evidence at the trial, the allegation of them in the pleadings cannot, in my judgment, tend to embarrass the defendant.

Appeal allowed.

Solicitor for plaintiff: *T. J. Robinson.*

Solicitors for defendant: *Lewis & Lewis.*

BAINES *v.* BROMLEY AND ANOTHER.

Dec. 20.

Ex. D.

Practice—Costs—Claim and Counter-claim for Liquidated Damages—Costs of the Cause—Order XXII., rule 10; *Order LV., rule* 1.

The plaintiff claimed to recover commission due to him from the defendants on an agreement. The defendants denied the claim, and raised a set-off and counter-claim for 230*l.* for goods sold. The jury found a verdict for the plaintiff on the claim for 114*l.*, and a verdict for the defendants on the counter-claim for 230*l.* Judgment was entered for the plaintiff on the claim, and for the defendants on the counter-claim for the balance:—

Held, by Pollock, B., that the defendants were entitled to the costs of the cause.

On a summons before a judge at chambers asking for a review of the master's taxation of the plaintiff's and defendants' bills of costs, the matter was referred to the Court.

The facts appear in the judgment.

Pollard, for the plaintiff.

Forbes, for the defendants.

Cur. adv. vult.

Dec. 20. Judgment was delivered by

POLLOCK, B. This was a summons to review the master's taxation of the plaintiff's and defendants' respective bills of costs, which came on before my Brother Lopes, and was referred by him to the Court. The case having been part heard before Hawkins, J., and myself, it was agreed by counsel that the arguments should be concluded before myself, and that my judgment should be accepted as that of the Court.

The plaintiff by his statement of claim sought to recover from the defendants commission which he alleged to be due to

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him from the defendants upon an agreement made between the plaintiff and the defendants, whereby the defendants agreed tha they would execute orders to be given by the plaintiff on behalf of Messrs. Dahl & Co. of Copenhagen for goods in the way of the defendants' business, and that they would supply the goods to the said Messrs. Dahl through the plaintiff, so as to enable the plaintiff to charge Dahl & Co. with the commission. The statement of claim then alleged that the defendants, in breach of the agreement, had supplied goods to Dahl & Co. otherwise than through the plaintiff, whereby the plaintiff lost his commission.

The defendants in their statement of defence denied the plaintiff's claim, and claimed against the plaintiff by way of set-off and counter-claim 230*l.* 0*s.* 9*d.* for goods sold by them to the plaintiff. The plaintiff by his reply admitted that he was indebted to the defendants in the sum of 230*l.* 0*s.* 9*d.*

The cause went down for trial before my Brother Cleasby and a special jury in London on the 23rd and 24th of May, 1878, when the jury found a verdict for the plaintiff on the claim for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counter-claim for 230*l.* 0*s.* 9*d.* The learned judge directed that judgment should be entered for the plaintiff on the claim, and judgment for the defendants on the counter-claim for 115*l.* 3*s.* 3*d.*, being the balance, and the certificate of the associate was drawn up accordingly.

Upon the taxation of the costs the master treated this as a verdict for the defendants, and gave to them the costs of the cause, including among other things the cost of interrogatories by the plaintiff to the defendants, and allowed the plaintiff only the costs of his witnesses whose evidence was essential to establish his claim against the defendants to the extent to which he succeeded.

It was argued before me that the master had proceeded upon an erroneous principle, and that he ought to have taxed in favour of the plaintiff all the costs of the cause incurred in respect of the claim as to which he succeeded, and allowed to the defendants so much of the costs of the cause as were incurred by them in respect of the counter-claim as to which they succeeded. On the part of the defendants it was argued that both claim and counter-

claim being for liquidated demands the case should be dealt with as if the defendants had been the plaintiff, and had recovered an amount in excess of what was claimed against them by the other side.

Assuming that the position of the defendants is to be taken as being identical with that of a successful plaintiff who has recovered the balance, the course taken by the master was clearly correct, being in accordance with a long established practice; and it becomes now necessary to consider what is the position of the plaintiff and of the defendants under the Judicature Act and the Rules. By Order XIX., rule 3, "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim;" and, by Order XXII., rule 10, "Where, in any action, a set-off or counter-claim is established as a defence against the plaintiff's claim, the Court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance;" and by Order LV., rule 1, which relates to costs, "Where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the judge, before whom such action or issue is tried, or the Court shall otherwise order."

Where the claim of both plaintiff and defendant is for a cause of action in the nature of a debt, and in the result a balance is found by the jury to be due from the plaintiff to the defendant, it appears to me that the same result ought to follow with respect to costs as would have followed before the Judicature Act in the case of a plaintiff who recovered a balance against a defendant, and that the event mentioned in Order LV., rule 1, is in such a case the recovery of the balance by the defendant. Where the counter-claim is in the nature of a claim for unliquidated damages, as in the case of a counter-claim for a tort or for a breach of contract, a different rule would apply, because it cannot be truly said that a plaintiff who seeks to recover a liquidated money claim

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against the defendant ought to foresee that the defendant will or may set up a counter-claim for unliquidated damages against him. Such a counter-claim may or may not be set up, and the defendant may prefer to bring a cross action, in which case the plaintiff would succeed in his action and be entitled to his costs. Where, however, there are cross accounts existing between the parties, or cross-claims, each of which is in the nature of a debt, it is often a mere accident which party is plaintiff and which defendant, and the plaintiff who asserts that the balance is in his favour, and commences an action, and at the trial turns out to be in the wrong, ought not, in my judgment, to be allowed any of the costs of the litigation which he himself has improperly provoked, and in such a case those costs which fall under the denomination of costs of the cause should be paid by the plaintiff.

Several cases were cited to me in the course of the argument, but in none of them did the question now before me arise. The distinction, however, which I have alluded to between a counter-claim for a debt and a counter-claim for unliquidated damages was pointed out by Manisty, J., in his judgment in *Stooke* v. *Taylor* (1), and also by Hawkins, J., in *Neale* v. *Clarke* (2), and the observations made by those learned judges so far as they are applicable would seem to support the view which I have taken.

It was further argued before me on behalf of the plaintiff that the master on taxation ought, in any event, to have allowed to the plaintiff the costs of certain interrogatories exhibited by the plaintiff to the defendants, for the purpose of discovering to what extent the defendants had in breach of their agreement supplied goods to Dahl & Co. otherwise than through the plaintiff. As the defendants had rendered no account to the plaintiff as to these goods, it was said that the plaintiff was compelled to obtain the information required by him in support of his action by means of these interrogatories, and that as he had succeeded to the extent of 114*l.* 17*s.* 6*d.*, he ought to have been allowed the costs of the interrogatories. With regard to this item it might very fairly have been represented to the learned judge who tried the cause as shewing good cause to him to order that these particular costs should not follow the event. No such application, however,

(1) 5 Q. B. D. 586. (2) 4 Ex. D. 286.

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was made, and no authority has been cited to me to shew that where the judge before whom the action is tried has made no order upon the subject, it is the duty of the master to exercise his discretion in such a case; and there are many reasons which lead me to think that such a course would be extremely inconvenient.

In the result, therefore, I uphold the taxation by the master, and the summons to review must be dismissed with costs.

Summons dismissed.

Solicitors for plaintiff: *Scott & Barham.*

Solicitors for defendants: *Bell, Brodrick, & Gray.*

EATON *v.* BASKER AND OTHERS, AND THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF GRANTHAM.

Dec. 20.

Ex. D.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 200—*Urban Authority—Contract exceeding* 50*l. in Value or Amount not under Seal—Corporation.*

Scarlet fever having broken out, an urban sanitary authority appointed a committee under s. 200 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). A medical man agreed verbally with the committee to attend the patients at the rate of 5*s.* 3*d.* per tent per day, and attended until the amount due was nearly 100*l.*:—

Held, by Stephen, J., that the committee were not liable as such, because they were forbidden to contract by s. 200 of the Act, and were not liable individually, because the contract was not with the members of the committee personally; and that since eventually more than 50*l.* became due it was a "contract whereof the value or amount exceeded 50*l.*" within s. 174 of the Act and ought to have been under seal, and that not being under seal no action lay on it against the urban authority, though they had had all the benefit of it.

Hunt v. *Wimbledon Local Board* (4 C. P. D. 48) followed.

At the trial before Stephen, J., the jury were discharged, and the action reserved for further consideration. On the 14th of December the case was argued by

Finlay (*Day, Q.C.*, with him), for the plaintiff.

J. C. Lawrance, Q.C., and *Lindsell*, for the defendants.

The following cases were cited: *Mayor of Ludlow* v. *Charlton* (1); *Paine* v. *Strand Union* (2); *Sanders* v. *St. Neot's Union* (3); *Arnold*

(1) 6 M. & W. 815. (2) 8 Q. B. 326; 15 L. J. (M.C.) 89.
(3) 8 Q. B. 810; 15 L. J. (M.C.) 104.

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v. *Mayor of Poole* (1); *Lamprell* v. *Billericay Union* (2); *Smart* v. *West Ham Union* (3); *Church* v. *Imperial Gas, &c., Co.* (4); *Austin* v. *Guardians of Bethnal Green* (5); *Clarke* v. *Cuckfield Union* (6); *Haigh* v. *North Bierley Union* (7); *Nicholson* v. *Bradfield Union* (8), in addition to those referred to in the written judgment, where the facts and arguments are stated.

Cur. adv. vult.

1880. Dec. 20. STEPHEN, J. This case was tried before me on the 22nd of November, and was argued on further consideration on the 14th inst. The action was brought by the plaintiff against the defendants to recover fees for medical attendance upon a contract made under the following circumstances.

In June, 1878, an outbreak of scarlet fever occurred in Grantham and the neighbourhood. There were at that time three urban sanitary authorities in the district, namely, the town council of the borough of Grantham, the Spittlegate Local Board, and the Gonerby Local Board. Each of these three authorities nominated a committee of three persons which were amalgamated into a single committee for the purpose of providing hospitals to receive the fever patients. The rural sanitary authority of the Grantham Union also nominated a committee of two persons to confer with the others and to ascertain the relative populations of the districts round Grantham. The eleven defendants were members of these four committees, and were the only defendants in the original statement of claim. Subsequently the three districts were amalgamated into the borough of Grantham, as it now stands, and the corporation of Grantham became subject to the liabilities of each of the three districts. In the amended statement of claim the corporation of Grantham were added as defendants, though the personal liability of the eleven committeemen was still insisted on.

The committees were appointed under ss. 200 and 201 of the Public Health Act, in order to exercise the power conferred upon

(1) 4 Man. & G. 860.
(2) 3 Ex. 283; 18 L. J. (Ex.) 282.
(3) 10 Ex. 867; 24 L. J. (Ex.) 201.
(4) 6 A. & E. 846.
(5) Law Rep. 9 C. P. 91.
(6) 21 L. J. (Q.B.) 349.
(7) E. B. & E. 873; 28 L. J. (Q.B.) 62.
(8) Law Rep. 1 Q. B. 620.

local authorities by s. 131, which enables such authorities to provide hospitals or temporary places for the reception of the sick, and to combine with other local authorities for that purpose. Though it was not mentioned in the argument, I may observe that s. 200 expressly provides that "a committee" (of an urban authority) "shall in no case be authorized . . . to enter into any contract." This restriction does not apply to committees of rural authorities. But it does not appear that the two defendants appointed by the rural authority of the Grantham Union were such a committee as is referred to in s. 201, and the case was argued throughout without reference to them.

The committee thus formed resolved to erect tents for the reception of scarlet fever patients, and directed Mr. Ashby, the medical officer of the sanitary authorities, to apply to Mr. Eaton, the plaintiff, a medical man in Grantham, to attend the patients. Mr. Eaton finally agreed to do so at the rate of 5*s.* 3*d.* per day per tent. This was on the 27th of June. Mr. Eaton attended from the 29th of June to the 15th of September. There were at first two tents, and others were erected afterwards. At the rate of 5*s.* 3*d.* a tent per day his charge came to 97*l.* 7*s.* 9*d.*

In the beginning of 1879 some correspondence took place, in which Mr. Eaton claimed the amount mentioned. The defendants offered a smaller amount, and at last on being sued pleaded that no contract was made, and that if any was made it was illegal and contrary to the provisions of s. 200 of the Public Health Act, 1875. At the trial it was admitted that Mr. Ashby was the agent of the defendants, and it was also admitted that if there was any liability at all it was a liability for the amount claimed. The plaintiff swore that it was not only a fair but a very moderate charge, and that he was induced to accept it because he was the only unmarried practitioner in the town. This was uncontradicted, and it is indeed obvious from the nature of the case that the work done must have involved loss of other practice and some degree of personal risk. In short Mr. Eaton undertook a dangerous public service.

Two questions of law arose upon the case. The first was whether the defendants were personally liable. The other, whether the contract made with the committee was binding on

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the mayor and corporation of Grantham as representing the local boards, notwithstanding the provisions of s. 174 of the Public Health Act.

As to the first question, it is to me clear that the contract was made with the committee, not in their individual capacity, but in their capacity as a committee. This is obvious from the evidence of the plaintiff himself, which is to the effect that Mr. Ashby met Mr. Eaton's first proposal by saying that "the committee or council" would not agree to it, and that he asked Mr. Eaton to attend a meeting held that night, which he did. Now the committee is expressly forbidden to contract by s. 200 of the Public Health Act, and if it were capable of doing so I think that the contract would not bind the individual members, for the reasons given in the somewhat similar case of *Leicester Waterworks Co.* v. *Nuttall.* (1) I think, however, that the committee may properly be regarded as the agents of the local boards now represented by the corporation of Grantham, and the question therefore comes to be whether the corporation of Grantham is liable, upon a contract made by them in their capacity of urban sanitary authority not under seal, nor in accordance with the provisions of s. 174 of the Public Health Act. Many cases were quoted as to the nature and extent of the common law rule as to the necessity that contracts by a corporation should be under seal, but they do not appear to me to be relevant to the present question. The contract in question is a contract under the Public Health Act, and made by a body which, though a corporation for other purposes, was on this occasion acting, or rather is on this occasion responsible, if at all, as an urban sanitary authority, which is itself the creature of a statute, and has no other powers than those which it derives from that statute. It seems to me to follow that its liability depends not upon the common law rule but upon the construction to be put upon s. 174 of the Public Health Act. That section enacts that "with respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely, 1. Every such contract whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority." Then other conditions are

(1) Law Rep. 4 Q. B. D. 18.

mentioned, of which it is enough to say that two of them relate exclusively to contracts for works, and the third exclusively to contracts of the value or amount of 100*l.* or upwards.

It was contended for the plaintiff that the section did not apply to contracts like the one with Mr. Eaton for personal services, but only to contracts for the erection of works, and much might be said for this view but for the case of *Hunt* v. *Wimbledon Local Board*. (1) In that case an architect made plans upon a verbal order from the surveyor of the local board, his charge for which exceeded 50*l.*, and it was held, first by Lindley, J., and afterwards by the Court of Appeal, that the board were not liable. Both the judgments appear to me to proceed upon the principle that the language of the section is unqualified, and applies to contracts of every description whatever, if their amount or value is over 50*l.* It is true that much discussion is to be found in the judgments referred to as to the existence and extent of certain exceptions to the common law rule as to the necessity of a seal in such contracts.

The first exception is where the contract is for a small amount and for an act of daily necessity. The judges held that this exception does not apply to statutory contracts, because the legislature had drawn the line at 50*l.* The second exception is where the party sued has had the benefit of the contract, the other side having performed the whole of his part of it. As to this it was pointed out by all the judges in the Court of Appeal that the extent of the exception and its very existence are obscure and doubtful matters, and they gave reasons for thinking that, even if the exception did exist, it would not apply to the particular case before them, but there is nothing in any of the judgments to indicate that this exception to the common law rule, whatever may be its nature or extent, does in fact apply to the enactment under consideration. The case appears to me to shew that s. 174 lays down a positive general rule, subject to no exceptions, as to all contracts made by local boards "whereof the value or amount exceeds 50*l.*," and on that ground I am reluctantly obliged to come to the conclusion that as this contract was not under seal it cannot be enforced.

(1) Law Rep. 4 C. P. D. 48.

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7 QBD 512

An attempt was made to shew that the contract was not one of which "the value or amount exceeded 50*l.*" when it was made, as it was a contract for 5*s.* 3*d.* per tent per day, but I think that it became a contract, the value or amount of which exceeded 50*l.*, as soon as the amount due to Mr. Eaton exceeded 50*l.*

It was also argued that it was a contract made upon an emergency, but I do not see that there is any reference in the Act to emergencies, nor am I satisfied that anything which can be called an emergency existed. It would have taken no time to speak of, to write down the terms of the contract and to seal them, and Mr. Eaton might have required either payment or a written contract at any time before the amount of 50*l.* was due to him.

Judgment for the defendants, with costs.

Solicitors for plaintiff: *Routh, Stacey, & Castle, for Henry Thompson & Sons, Grantham.*

Solicitors for defendants: *Bolton & Co., for Henry Beaumont, Grantham.*

Dec. 1.

Q. B. D.

WALLINGTON, APPELLANT; HOSKINS, RESPONDENT.

Highway—Highways and Locomotives Amendment Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Extraordinary Expenses—Excessive Weight—Traffic from recognised Business in Neighbourhood.*

8 QBD 161 — 469.

Upon the hearing of a complaint made by a highway board under the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23, for the purpose of recovering from the appellant extraordinary expenses incurred by the board by reason of traffic conducted by him, it appeared that he was owner or occupier of stone quarries in the district, and that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognised business in the neighbourhood, and the waggon loads of the usual weight in such traffic. The justices having upon these facts found, first, that the traffic was not extraordinary, secondly, that the weights were excessive, and thirdly, that the expenses were extraordinary:—

Held, that the first finding, which was warranted by the evidence, shewed that the expenses were not "extraordinary" within the meaning of the section, and that they could not be recovered from the appellant.

CASE stated by justices for Wilts under 20 & 21 Vict. c. 43.

1. The respondent is the surveyor to the Trowbridge District

Highway Board, the authority liable or which has undertaken to repair the highways hereinafter described.

2. The appellant is a quarry master carrying on business at one of the quarries hereinafter mentioned and using the highways.

3. On the 24th of March, 1879, the respondent, as such surveyor, certified to the authority, that having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses had been incurred by them in repairing the highways hereinafter particularly described by reason of damage caused by excessive weight passing along the same or extraordinary traffic thereon. An information or complaint having been exhibited, a summons was issued calling upon the appellant to appear before the justices pursuant to the statute.

The hearing of the case was adjourned from time to time until the 25th of June, on which day the respondent sought to recover in a summary manner from the appellant, as the person by whose order such weight or traffic had been conducted, the amount of such expenses from the 29th of September, 1878, to the 25th of March, 1879.

4. The following facts were proved:—

5. There are three highways in question: the first a road measuring 1*m.* 0*f.* 8*p.* is in the Black Dog Turnpike Trust, but by statute the burden of repairing this part of the road falls upon the Trowbridge District Highway Board, although the turnpike trustees take tolls up to the 1st of November, 1879. The second measures 1*m.* 2*f.*, and was formerly a turnpike-road, but has been disturnpiked; and the third, measuring 4*f.* 36*p.*, is an ordinary parish road which is also repaired by the highway board.

6. Two stone quarries are situate within the district of the Weston (Bath) Highway District Board, Somerset, to which they are rated. A third stone quarry is in the parish of Limpley Stoke, in Wilts, and within the district of the Trowbridge District Highway Board. This quarry belongs to the appellant.

7. Similar stone quarries exist, and are worked in two other parishes of the district of the authority, and also within the district of another highway authority in the neighbourhood, the Chippenham District, and the stone traffic is a recognised business in the before-named parishes. The quarry of the appellant in the

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parish of Limpley Stoke was opened many years since, but in or about the year 1871, additional quarries were opened by the other parties hereinafter mentioned, and the business has much increased at the quarry of the appellant as well as at such new quarries. It has not been more extensive since the passing of the Highway and Locomotive Amendment Act, 1878, than it was previously thereto. The business is of a permanent character, and is likely to be so while a demand for Bath building stone continues, and so long as the stone can be obtained. The available supply is very large.

8. The appellant, as occupier of the third stone quarry, hauls the stone gotten by him from the quarry to the railway station. The stone is taken by the appellant in loads which with the waggons vary from 4½ tons to 6 tons in weight, drawn by from three to five horses. These are usual weights in the stone traffic. The wheels of the waggons are from 4½ inches to 6 inches in breadth; particulars of the loads for a certain period were produced on the hearing of the summons, and are hereafter set forth.

9. The wheels of the greater breadth are covered or bonded with two tires, of which the inner is 3½ inches or thereabouts in width, and the outer is 2½ inches or thereabouts in width, and the waggons with regard to the wheels, as well as in other respects, are constructed in the manner usually adopted for stone waggons.

10. Parts of the roads to the railway station respectively consist of hills, which in certain parts are so steep that it is necessary to fasten the wheels of loaded waggons descending such hills; for which purpose both hind wheels of the waggons are chained and breaks are applied. This is done in the ordinary way. The dragged wheels wear the roads very rapidly, and frequent relaying of metal is necessary. It is necessary to use hard stone, which can only be obtained from a distance, and is more expensive than the local stone which was used for the same highways before the increase of the stone traffic. The highways subject to agricultural traffic only, require little or no repair in the summer, but the highways subject to stone traffic require repair in summer, as well as winter.

11. Portions of the third highway are so narrow that, except at intervals, two vehicles cannot pass each other.

12. That portion of the first highway when taken to by the highway board, at the end of 1875, was not in good repair, and the expenses were increased for the year 1876–77, but the cost of repairing the highways over which stone traffic passes is, under any circumstances, greater than would be necessary if the highways were not used for the stone traffic or other continuous traffic. It is admitted that at the present time there is but little traffic on the highways in the parish of Limpley Stoke, beyond the stone traffic and the traffic of an agricultural neighbourhood.

13. The cost of repairing the highways in the parish of Limpley Stoke, from the year 1870 to the present time, has been as follows:—

	M.	f.	p.	£	s.	d.
For the year ending 31st December, 1870:—						
Cost of repairing Limpley Stoke roads, three miles, excepting the first and second highways		—		17	12	3
For the year ending 31st December, 1871:—						
Cost of repairing same, excepting first highway ..	4	2	0	25	12	5
For the year ending 31st December, 1872:—						
Cost of repairing same, excepting first highway ..	4	2	0	27	18	1
For the year ending 31st December, 1873:—						
Cost of repairing same, excepting first highway ..	4	2	0	65	5	11
For the year ending 31st December, 1874:—						
Cost of repairing same, excepting first highway ..	4	2	0	149	0	3
For the year ending 31st December, 1875:—						
Cost of repairing same, excepting first highway, and also first highway from 1st November, 1875, to 31st December, 1875	4	2	0	340	3	0
For the year ending 25th March, 1877:—						
Cost of repairing same, including first highway ..	5	2	0	534	7	3
For the year ending 25th March, 1878:—						
Cost of repairing same, including first highway ..	5	2	0	498	15	7
For the year ending 25th March, 1879:—						
Cost of repairing same, including first highway ..	5	2	0	414	10	11
For the year ending 25th March, 1880:—						
Contracts had been accepted for repairs during the current year		—		407	17	6

Since the year 1874, the roads have been repaired with more durable materials than were previously necessary, and consequently more expensive, the local stone having sufficed. The roads have, in fact, been formed and maintained with reference to the stone traffic, and it is estimated that the last-mentioned con-

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tract represents the usual cost of maintaining them for such traffic. It is estimated by the respondent to be the mininum cost so long as the stone traffic continues as at present.

14. Such of the highways in the neighbourhood as are subject to agricultural traffic, only cost a yearly sum of from 13*l.* 10*s.* to 21*l.* 5*s.* per mile per year for repairs; but such of the highways in the neighbourbood as are subject to stone traffic, cost a yearly sum of about 130*l.* per mile, and such of the highways in the neighbourhood as are subject to other continuous or heavy traffic, cost sums varying according to the nature and extent of the traffic up to 70*l.* per mile per year, which is the cost in the town of Trowbridge, containing a population of 12,000 persons or thereabouts.

15. The following is a detailed statement of the stone taken by the appellant from his quarry, between the 8th of February and the 1st of March, 1879, shewing the weight of each load and the number of horses drawing the same, and also shewing which loads consisted of only one block of stone, that is to say—

Date.	No. of horses.	Feet in each stone.	Feet in each stone.	Feet in each stone.	Feet in each stone.	Weight of load.
						Tons cwt. qrs.
1879, Feb. 17th	4	56	16	..	..	4 10 0
	3	59	one stone	..	..	3 13 3
	4	29	29	9	..	4 3 3
	4	41	27	..	..	4 5 0
	3	33	22	..	..	3 8 3
	5	57	17	..	..	4 12 2
	3	33	19	7	..	3 13 3
1879, Feb. 18th	4	56	15	..	..	4 8 3
	3	34	17	..	..	3 3 3
	4	63	10	..	..	4 11 1
	3	38	16	..	..	3 7 2
	4	45	19	11	..	4 13 3
	3	28	19	9	..	3 10 0
	4	25	20	15	12	4 10 0
	3	44	12	..	..	3 10 0
1879, March 1st	4	50	10	8	..	4 5 0
	3	35	27	..	..	3 17 2
	4	48	17	9	..	4 12 2
	3	51	15	..	..	4 2 2
					Total	77 0 0

The waggons weigh from a ton to a ton and a half in addition to the load of stone carried thereon.

16. It was agreed that traffic between the passing of the Act and the date of the said certificate should be deemed to be fairly represented by the traffic for the period between the 1st of February and the 8th of March, 1879, as before set forth.

17. Two other quarry masters use the same highways for stone traffic at the same time as the appellant, and to a great extent, and the traffic of all the parties is intermingled in the ordinary way. Orders were made against the other quarry masters at the same sessions as the order against the appellant was made.

The appellant contended (*a*) that the stone traffic was a regular continuous and ordinary traffic arising from the normal business of the neighbourhood, and was not extraordinary within the meaning of the said section; (*b*) that the weights were not excessive within the meaning of the section; (*c*) that the expenses incurred in repairing the highways under the circumstances hereinbefore set forth were not extraordinary expenses; (*d*) that under the circumstances hereinbefore set forth no damage could be attributed to the traffic of the appellant, as distinguished from that of the other quarry masters, and (*e*) that the justices could not convict the appellant of causing damage by reason of excessive weights passing along the highways, without evidence that particular weights had been excessive, and had caused damage, and that the frequent repetition of ordinary loads could not constitute an excessive weight.

The justices were of opinion:—

1. That the traffic was not extraordinary within the meaning of the said section; 2. That the said weights were excessive within the meaning of the said section; 3. That extraordinary expenses had been incurred by reason of damage caused by excessive weights within the meaning of the section.

They, therefore, ordered the appellant to pay to the respondent the sum of 15*l.*, with the alternative of seven days' imprisonment in case of default.

The questions for the opinion of the Court are:—

1. Whether or not there was evidence to support the decision of the justices, that the weights were excessive within the meaning of the section; 2. Whether or not there was evidence to support their decision, that extraordinary expenses had been incurred by

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reason of damage caused by excessive weights within the meaning of the section; 3. Whether or not their decision, that the weights were excessive was correct in point of law; 4. Whether or not their decision, that extraordinary expenses had been incurred by reason of damage caused by excessive weights was correct in point of law.

A. Charles, Q.C. (*Poole*, with him), for the appellant. The finding of the justices that the traffic from the stone quarries is not "extraordinary traffic," being a recognised business in the neighbourhood, is inconsistent with any liability of the appellant under the section. In *Aveland* v. *Lucas* (1), Grove, J., says that the words "weight" and "traffic" in the section are used with reference to the road itself—weight and traffic which are abnormal and beyond the ordinary traffic on the road.—Adopting this test, it is clear that the justices have found that the traffic is not extraordinary, having regard to that to which the road is ordinarily subjected. They have, in fact, found that the weights are weights usually carried in the stone trade. This being the case, it must follow that they are not "excessive," and the order charging the expenses on the appellant cannot be maintained.

Patchett, Q.C. (*R. Lopes*, with him), for the respondent. The substantial question in the case is whether there was evidence to warrant the finding of the justices that the weight brought by the appellant on the highways was excessive. The finding that the traffic was not extraordinary must be taken to mean that the separate waggons were loaded in a manner not unusual in the district, but if a large and increasing number of such waggons are sent along the highway an excessive weight is placed upon it.

[FIELD, J. The highway board have to consider whether the weight is excessive at the time when they make their rates. They ought not to consider the extent of the traffic at an earlier date.]

The case of an army marching over a bridge is an illustration of the respondent's argument. The weight of each soldier is trivial, but the aggregate weight of the whole force would be excessive, as it might be more than the bridge would bear. It is

(1) 5 C. P. D. 211.

a natural inference from the facts stated that the wear and tear caused by the appellant's waggons is extraordinary, and the expenses ought therefore to be charged upon him.

LORD COLERIDGE, C.J. I am of opinion that the order of the justices must be reversed. With one of their findings both of us I believe are satisfied, and speaking for myself I think that this finding concludes all the other matters. The question arises under the 23rd section of 41 & 42 Vict. c. 77, which enacts as follows:—[The Lord Chief Justice read the section.] In the highway board district there are several stone quarries, and in consequence of the number of vehicles used for the purpose of carrying the stone along the roads in the district, either to the railway station or elsewhere, it is necessary that the roads, first of all, should be made of harder materials than they otherwise would be made of, and then those roads are worn much more rapidly than the traffic of an ordinary agricultural district, or waggons carrying ordinary agricultural produce would wear them. Those seem to me to be the only facts found by the justices with which it is necessary for us to deal. The case of the respondent was that the traffic itself was extraordinary traffic. The justices have found, and in my judgment have rightly found, upon the facts that the traffic was not extraordinary, but ordinary traffic, regard being had to the industry of the place, and regard being had to the recognised mode in which that industry is carried on. But having found that, they go on to say that if they can find as a matter of law that under those circumstances the weight was excessive, they do find that the owners of these quarries have put upon the road an excessive weight, and if they have put upon the road an excessive weight and have thereby worn out the road more rapidly than it would otherwise have been worn out, then the third finding naturally follows that the expenses which have been incurred by such excessive weight are within the meaning of the Act of Parliament "extraordinary expenses."

Now I agree with them that the two points are connected, and that if the weights are excessive and do damage, it follows that the expenses incurred by repairing the damage done to the road by such excessive weight are extraordinary expenses. It is not

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always that you can convert a proposition simply, but it seems to me in this case you can, and that it follows if the weights are not excessive the expenses that are incurred in repairing the roads by reason of those weights are not extraordinary expenses. Now are these weights, excessive? They consist of a number of tons of stone, and it is said on behalf of the appellant that, regard being had to the mode in which this industry is carried on, the recognised weights, and the usual kind of carts which are necessary for carrying it on, the weights are not excessive. That if this were a purely agricultural district, and the weights which the roads have ordinarily to bear were purely agricultural weights, so to speak, then these weights would be excessive. It seems to me that the moment the justices have found this is an ordinary and recognised industry of the place, and that it is carried on in the ordinary and recognised mode in which such industry is carried on, the weights are no longer excessive. Then it is suggested that there is a fallacy in this reasoning, because if we hold these weights not to be excessive, it follows that if all were put together, or the same amount of weight was carried in different proportions, those weights would still not be excessive. I fail to see the consequence. The illustration placed before us by the respondent of an army marching over a suspension bridge appears to me to be destructive of his case. An army of 20,000 men if they march in twenty-four hours two or three at a time over a suspension bridge will do it no harm; the same army crossing at one time 20,000 men strong will break down the bridge. It has carried the same weight at the end of the twenty-four hours it is true, but it has not carried the same weight under the same conditions. Therefore, though the weight altogether is the same, the separate weights may never be excessive. The question is not what is the aggregate of the weight, but the conditions under which the weight is carried, and the proportion in which it is distributed. It seems to me there was nothing from the facts the magistrates have favoured us with in the case that justified them in finding within the meaning of the Act of Parliament that the weights carried in this case were excessive. I am glad to think in this case we are deciding in full accordance with the decision of the Common Pleas Division in *Aveland v. Lucas* (1), confirmed by the

(1) 5 C. P. D. 211.

Court of Appeal. I think nothing can be more to the point than the observation of my Brother Lindley, which I adopt as my own. There the question related to extraordinary traffic and excessive weight, but I apply his expression to the words excessive weight and extraordinary expenses. He says, "It appears to me that those words must mean 'excessive,' and 'extraordinary' with reference to the ordinary use and traffic upon and over the road. If any thing is done of an unusual and extraordinary kind the person doing it must pay for the damage thereby occasioned. It is the ordinary nature of the traffic over the road which is to be the standard."

The order must be quashed.

FIELD, J. I concur with my Lord in the judgment he has given, and in the reasoning on which it is founded. We are called upon to define the meaning of the words "extraordinary" and "excessive." Before we do that we must know what is "ordinary," and what is the usual state of things beyond which there has been an excess. We are dealing with the expense of providing highways—highways to be used by everybody for their lawful purposes, and particularly for the transport of goods such as those described in the case. The highway districts are bound to provide the expense by rating themselves. Then according to what standard are the highways to be repaired? It is clear they ought to be repaired up to the standard of the traffic which the roads will have to bear. The traffic in this district has increased and the ordinary expense has been raised to the extent stated in the case. The roads must however be repaired up to the existing standard of traffic just as much as the roads in Westminster or London must be repaired up to the standard of traffic here. Is there any extraordinary traffic? The justices have found there is not. I quite agree. Then is there anything excessive? The respondent contends that as the appellant took twenty-eight tons over this road upon one day the weight was excessive, for if you put all those twenty-eight tons together in a waggon drawn by a locomotive, that would have been excessive according to the decision in *Aveland* v. *Lucas*. (1) But it must be remembered

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that the road is constructed with a metalled surface to bear the amount of weight which is likely to be brought at any one moment upon it. If you are going to build a house you do not put gravel at the foot of it. You put concrete. Why? Because you want a material that will support an enormous weight. If the ordinary traffic required concrete, they would have to put concrete there; but they put metal on the top of the road, which is sufficient to resist the wheel going over with four-and-half or five tons at one and the same moment, but is not enough to resist the enormous pressure of twenty-two tons; the weight in *Aveland* v. *Lucas* (1), I think. I can find therefore nothing extraordinary in the traffic, and I quite agree with my Lord in thinking the question of extraordinary expenses depends upon the traffic.

Judgment for the appellant.

Solicitors for appellant: *Whites, Renard, & Co., for Henry Brittan, Press, Inskip, & Co., Bristol.*

Solicitors for respondent: *Whitakers & Woolbert, for Clarke & Collins, Trowbridge.*

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(C. A.)

Ex. D.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Revenue—Railway Passengers Duty—5 & 6 Vict. c. 72, *s.* 2—*Conveyance of Passengers—Duty upon Sums charged to cover Duty—Duty upon Sum charged for Sleeping Accommodation.*

By the 2nd section of 5 & 6 Vict. c. 79, and the schedule to that Act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare, or conveyance of passengers conveyed for hire upon any railway. The defendants, by a local Act, were prohibited from charging to their passengers more than certain specified sums per mile, which sums were to include all expenses incidental to their conveyance, except government duty. The defendants, in addition to the sum charged by them to their passengers for conveyance, charged to and received from such passengers a further sum at the rate of 5 per cent. on the former, to cover the government duty. The Crown claimed duty on the latter sum as well as on the former:—

Held, affirming the decision of the Exchequer Division, that the Crown was entitled to duty on the whole amount received from the passengers, even though

(1) 5 C. P. D. 211.

such amount should exceed the maximum charge for conveyance fixed by the local Act.

The defendants attached to certain of their night trains sleeping carriages for the accommodation of such of their first-class passengers as might choose to avail themselves of it. For the use of these carriages such passengers were charged an extra sum in addition to the ordinary first-class fare. In addition to couches with pillows, sheets, and blankets, each carriage contained a lavatory, water-closet, and other conveniences. Passengers using such carriage were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the middle of the night the carriage was put into a siding, and the passengers allowed to remain in their beds until the morning. A special servant was employed to wait upon them, call them in the morning, and bring them hot water. The Crown claimed duty upon the sums charged to passengers for the accommodation provided in the sleeping carriages:—

Held, affirming the decision of the Exchequer Division, that such accommodation was incidental to the conveyance of the passengers, and that the Crown was entitled to the duty claimed.

APPEAL by the defendants from a decree of Kelly, C.B., and Hawkins, J. (1), in favour of the Crown, upon an information under 5 & 6 Vict. c. 79, s. 4.

The defendants are a railway company incorporated by statute for the purpose, inter alia, of carrying passengers for hire. By 5 & 6 Vict. c. 79, s. 2, and the schedule to that Act, a duty at the rate of 5 per cent. was made payable "upon all sums received or charged for the hire, fare, or conveyance of passengers," on any railway. By s. 63 of a local and personal Act of the defendants (9 & 10 Vict. c. cciv.), it is enacted, "That the maximum rate of charge to be made by the company for the conveyance of passengers along the said railway, including the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty," shall not exceed certain sums there specified. The defendants in addition to the sum charged by them to their passengers for conveyance, whether maximum or not, charged to and received from such passengers a further sum at the rate of 5 per cent. on the former to cover the government duty. The Crown claimed duty on this latter sum as well as on the former, although the latter was not nominally charged for conveyance.

The defendants attached to certain of their night trains sleeping

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carriages for the accommodation of such of their first-class passengers as might choose to avail themselves of it. For the use of these carriages such passengers were charged an extra sum in addition to the ordinary first-class fare. In addition to couches with pillows, sheets, and blankets, each carriage contained a lavatory, water-closet, and other conveniences. Passengers using such carriage were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the middle of the night, the carriage was put into a siding and the passengers allowed to remain in their beds until the morning. A special servant was employed to wait upon them, call them in the morning, and bring them hot water. The Crown claimed duty upon the sums charged to passengers for such sleeping accommodation.

1880. Nov. 27. *Sir F. Herschell, S.G.* (*Dugdale*, with him), for the defendants. Sect. 63 of the defendants' local and personal Act (9 & 10 Vict. c. cciv.) in fixing the maximum rate of charge for the conveyance of passengers provides that such maximum charge shall include all expenses incidental to such conveyance except government duty; that impliedly authorizes the company to charge the passenger with the duty in addition to the maximum charge for conveyance. But if such excess sum may lawfully be charged to the passenger, it can only be so if it is charged as duty and not as part of the fare. But if such excess sum is paid by the passenger as duty and not as part of the fare, the Crown is not entitled to duty upon it. The defendants limit their contention on this point to cases in which the aggregate of the sums charged to the passenger for fare and for duty exceed the maximum charge fixed by s. 63; it must be conceded that where the aggregate of such sums do not exceed such maximum the company are liable to pay duty on the sum charged to the passenger for duty.

On the second point it is contended that the additional charge made for the sleeping accommodation is no part of the fare, not being incidental to the conveyance. On some railways there is a dining car attached to the train, but it could never be contended that the charge made for the dinner was part of the charge made

for the conveyance. It must be admitted that what is and what is not incidental to the conveyance is a question of degree.

Sir H. Giffard, Q.C. (*W. W. Karslake*, with him), for the Crown. [He was directed by the Court to confine himself to the second point.] The company are by statute authorized to convey passengers for hire. There their authority, as regards passengers, stops. They are not authorized to provide passengers with anything except conveyance. But if they are authorized to do nothing else than convey, they are estopped from disputing that any sum which they may charge to the passenger is charged in respect of conveyance. It is contended that on any sum charged to the passenger, no matter what the charge be made for, the Crown is entitled to duty. But the claim of the Crown may be supported without going that length. The term "conveyance" must be taken to include all that is reasonably ancillary to the conveyance. The additional comfort of a sleeping car is only a mode of the conveyance, for it is only a passenger who could enter such a car. The difference between a sitting and recumbent position can make no difference in point of law.

Sir F. Herschell, S.G., replied.

Cur. adv. vult.

1881. Feb. 4. The judgment of the Court (Lord Coleridge, C.J., Baggallay and Brett, L.JJ.) was delivered by

LORD COLERIDGE, C.J. By the 2nd section of the Railway Passengers Duty Act (5 & 6 Vict. c. 79) a duty is made payable in respect of all passengers carried for hire upon or along any railway; and it is enacted that such duty shall be "at and after the rate of 5*l.* for every 100*l.* upon all sums received or charged for the hire, fare, or conveyance of all such passengers." It appears that, in fixing the sums to be paid by passengers conveyed by their railway, the defendants have taken into account the amount of duty to which they considered they would be liable, and have added to the sum which, but for such liability, they would have deemed a sufficient fare, a further sum, calculated at the rate of 5 per cent. upon the former, to cover the amount of duty, and they insist that the last-mentioned sum, so calculated, is the full amount of duty payable by them, though the aggregate of the

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two sums is the amount charged to, and received from, the passenger.

The Attorney-General, however, contends that, according to the true construction of the Act, the amount of duty properly payable is a sum equal to 5*l.* per cent. upon the aggregate amount paid by the passenger. The first question raised by the present action is, which of these two contentions should prevail; the Exchequer Division has decided, and in our opinion has rightly decided, in favour of the Crown.

The only question which we have to consider is as to the construction of the Act; neither the way in which the company have arrived at the fares which they deem necessary or expedient to charge to the passengers who use their railways, nor the mode in which they keep their accounts can affect the question of construction. In our opinion the language is free from doubt; the price which the passenger is called upon to pay, and does pay, for his ticket, without which he is not at liberty to travel by the railway, is the sum charged to him and received by the company, for his conveyance to his destination, of whatever items it may be composed; and, if so, it is upon this price or sum that the amount of duty is by the Act directed to be calculated.

Reliance has been placed by the defendants upon the language of a clause in one of their local and personal Acts (9 & 10 Vict. c. cciv.) which fixes the maximum rates which they are to be at liberty to charge for the conveyance of passengers, and provides that such maximum rates shall include the tolls for the use of the railway, and of carriages, and for locomotive power, and every other expense incidental to such conveyance, except government duty; and it has been urged that if the defendants can only charge the maximum rate with 5 per cent. additional upon that maximum rate and have to pay duty upon the aggregate sums, they will be substantially receiving something less than the maximum; this may be so, if they are at liberty to add anything to the maximum rate, though doubts may be entertained and have been expressed as to their power to do so; but, assuming such to be the case, any loss to which the company may be thereby subjected is due to the provisions of their Local and Personal Act, which has imposed fetters upon them, and cannot affect the

construction of the Railway Passengers Duty Act, which was passed four years previously.

But a second question has been raised in the action, the answer to which should, in our opinion, upon consideration, be also answered in favour of the Crown. It appears that to certain of their trains, running in the night, what are termed "sleeping carriages" are attached, for the use of which by persons who have taken first-class tickets an extra charge is made; these carriages afford not only special accommodation for sleeping, but lavatories and other conveniences; the passengers travelling in these carriages have particular privileges; they are not disturbed during the night by demands to exhibit their tickets, and should they arrive at their destination early in the morning, they may remain in the sleeping berth until it is convenient for them to leave; a special servant also is attached to these carriages whose duty it is to call the passengers in the morning and supply them with hot water. A separate charge is made for this accommodation, and a separate ticket given to the passenger who desires to avail himself of it.

The defendants contend that they are not liable to pay duty on the price of their separate tickets. The Exchequer Division has held that they are.

We are of the same opinion. We regard the additional accommodation afforded by the sleeping carriages as differing in no essential particular from the superior accommodation afforded by a second class carriage over a third, or by a first class carriage over both. If the company issued tickets to all passengers alike at the price charged to passengers travelling in third class carriages, and then issued tickets, at corresponding prices, to those desiring to travel in a higher class of carriage, it could hardly be contended that duty would not be payable upon the prices paid for such second ticket.

The passenger, who is content to travel in a third class or second class carriage in the day, might well desire to travel in a carriage of a higher class by night; and, in like manner, a passenger ordinarily travelling by day in a first class carriage might desire the additional accommodation at night of a sleeping carriage. No separate charge is made in the present case; the

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charge, though written on a separate ticket is, in our opinion, part of one charge for the conveyance of the passenger in a particular way, and is therefore a part of the charge for the conveyance of a passenger received and charged for such conveyance. We are of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *R. F. Roberts.*

1880
Nov. 19.

(C. A.) Q. B. D.

[IN THE COURT OF APPEAL.]

RIVAZ, ON BEHALF OF HIMSELF AND OTHERS *v.* GERUSSI BROTHERS & COMPANY AND T. M. GERUSSI.

Insurance, Marine—Open Policies—Declaration of Shipments at less than real Value—Concealment of material Fact—Policies set aside.

The concealment by the assured at the time of effecting a marine policy of insurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all, or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk insured.

The defendants effected with the plaintiff, a Lloyd's underwriter, a series of open policies for certain specified sums to cover shipments to be declared and valued as interest might appear. The policies were effected at different dates, and were to succeed each other in the order of date. The value of the shipments were declared at considerably less than their real value, so that when the later policies were effected the earlier policies were in fact more exhausted than they would appear to be from the declarations. The undervaluation of the shipments was systematically and fraudulently made by the defendants, and the fact that they had been so undervalued was concealed from the plaintiff when he underwrote the later policies:—

Held, that, under these circumstances, a jury would be justified in finding that the concealment was of a fact of which it was material that the plaintiff should have been informed, in order to guide him in deciding whether he would underwrite these later policies or not or at what rate; and that on the jury so finding the plaintiff was entitled to have such later policies set aside and cancelled.

THIS was an action in which the plaintiff suing on behalf of himself and all others, the underwriters on two policies of marine insurance for 20,000*l.* each, dated respectively the 7th of October, 1879, and the 3rd of November, 1879, claimed that it might be

declared that such policies were obtained by fraud and concealment of material facts, and that such policies might be respectively set aside and cancelled.

One of the defendants carried on business at Patras under the style or firm of M. Gerussi, and the others carried on business in London as Gerussi Brothers & Co., and the firm M. Gerussi in the ordinary course of their business made shipments of fruit from Greece or the Ionian Isles, and consigned them to Gerussi Brothers & Co. in London for sale.

The policies the subject of this action were two of a series of four policies effected at Lloyd's by the defendants, to cover fruit and produce from Greece and the Ionian Isles to London or Liverpool by any steamer or steamers in which such might be shipped from time to time, and which were to be declared and valued as interest might appear. The first of these four policies was dated the 3rd of September, 1875, and was effected by a slip signed the 24th of August, 1875. It was for 25,000*l.*, and was underwritten by the plaintiff and, with few exceptions, by all the persons on whose behalf he sued. The second policy was dated the 1st of October, 1875, and was effected by a slip on the 18th of the previous September. It was for 20,000*l.*, and by its terms it was to follow and succeed the policy for 25,000*l.* of the 3rd of September. It was also underwritten by the plaintiff and, with few exceptions, by all the persons on whose behalf he sued. The third policy was dated the 7th of October, 1875, and was effected by a slip on the 1st of October. It was for 20,000*l.*, and was to follow and succeed the last-mentioned policy of the 1st of October. This third policy was underwritten by the plaintiff and by all the persons on whose behalf he sued. The fourth policy was dated the 3rd of November, 1875, and was effected by a slip on the 5th of October. It was for 20,000*l.*, and was to follow and succeed the last-mentioned policy of the 7th of October. This fourth policy was underwritten by the plaintiff and, with two or three exceptions, by all the persons on whose behalf he sued.

On the 5th of November, 1875, the steamer *Vindomora* was sunk in the course of a voyage from Patras to London by which a large shipment of currants which had been made by the said firm of M. Gerussi and consigned to Gerussi Brothers & Co. was lost, and

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a claim of 17,769*l.* 19*s.* 8*d.* was made in respect of such loss upon the policies of the 7th of October and the 3rd of November, 1875, that is to say, 12,500*l.* from the underwriters on the policy of the 7th of October, being the amount alleged to be open on that policy, and 5270*l.* from the underwriters on the policy of the 3rd of November.

The plaintiff alleged in his statement of claim that, in investigating the claims so made on the said policies, it was for the first time discovered that the declarations and valuations made on the policies in respect of previous shipments were false and fictitious, and that previous to the loss of the *Vindomora* the said policies had been filled and exhausted by previous shipments insured by the said policies for very large amounts, and which had arrived safely, and that the defendants had fraudulently concealed and abstained from declaring the amounts which had been so previously insured by the said policies, and had declared some of such shipments at a less sum than the true value thereof, and at a less sum than the value at which the same respectively had been at risk on and insured by the said policies during the respective voyages. The plaintiff further alleged that during the currency of the policies of the 3rd of September and the 1st of October, and before the policies of the 7th of October and the 3rd of November were effected the defendants had systematically concealed and omitted to declare on the two first-mentioned policies the values of the interests from time to time insured thereby and which arrived safely, and that the said policies of the 7th of October and the 3rd of November were effected for the purpose of continuing such wrongful and fraudulent practices.

The plaintiff also alleged that at the time of effecting such last-mentioned policies, the defendants concealed the improper declarations hereinbefore-mentioned from the underwriters, and that at the time when the plaintiff and the other underwriters underwrote such last-mentioned policies respectively they were entirely ignorant of the facts relating to such declarations, and they would not have underwritten the said policies if they had known the said facts.

The defendants denied that the declarations or valuations in respect of previous shipments were false, or that previously to the

loss of the *Vindomora* the said policies had been filled or exhausted by previous shipments, and they denied generally all the said alleged concealments and fraudulent practice, or that at the time when the policies of the 7th of October and the 3rd of November were underwritten there were any facts relating to such declarations or otherwise which ought to have been but were not disclosed to such underwriters.

The cause was tried at the London Michaelmas Sittings, 1879, before Field, J., when the jury found, inter alia: First. That the defendants declared some of the shipments prior to the *Vindomora* at less sums respectively than the value at which the same shipments had been at risk and insured by their policies. Secondly. That the defendants made such declarations falsely and fraudulently, and that such declarations were material to the subscription of the policies of the 7th of October and the 3rd of November, 1875, and that the plaintiff and those for whom he sued were thereby induced to subscribe them. Thirdly. That the defendants concealed and abstained from declaring the amounts which had been on risk and insured by their policies; and Fourthly. That it was material to the risk taken by the underwriters to be informed of the matter so concealed and abstained from being declared.

The learned judge after these findings ordered judgment to be entered for the plaintiff.

The defendants appealed.

Sir H. James, A.G., Benjamin, Q.C., and *Romer*, for the defendants. The plaintiff is not entitled to judgment. There was no misrepresentation by the defendants at the time of effecting the policies the subject of this action, and that distinguishes this case from that of *Sibbald* v. *Hill* (1), on which Field, J., relied when he ordered judgment to be entered for the plaintiff. The only concealment was the concealment of an intention to pay too little premiums. To vitiate a policy the concealment must be of facts material to the risk insured. The opinion of Duer is, "that those facts only are necessary to be disclosed which, as material to the

(1) 2 Dow. 263.

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risks considered in their own nature, a prudent and experienced underwriter would deem it proper to consider:" 2 Duer on Insurance, p. 390. There was no such concealment here. The amount at which the previous policies had been filled could have no effect on the risk insured, that is to say, whether the cargo would arrive safely, nor would the knowledge or not of such a matter be at all regarded by the underwriter when he subscribes the policy. The findings of the jury as to this are therefore immaterial. *Stephens* v. *Australasian Insurance Company* (1) shews that the declaration of the shipment may be altered at any time, even after her loss. In *Ionides* v. *Pender* (2) the goods were largely overvalued so as to make the risk a speculative one, and therefore it was a matter which would necessarily affect the mind of an underwriter as to entering or not into the policy.

[BRETT, L.J. In delivering his judgment Lord Blackburn did not accept the rule as laid down by Duer, but took in preference that in 1 Parsons on Insurance, p. 495.]

The defendants, of course, must rely on the doctrine as stated by Duer. This action, moreover, is not by the assured to recover a loss, but is an action by the underwriters to set aside the policies, and as, if that were done, the parties could not be placed in the position they were before entering into the policies, at most there ought only to be a readjustment according to the true value.

Butt, Q.C., Webster, Q.C., and *J. C. Mathew*, appeared for the plaintiff, but were not called upon.

BAGGALLAY, L.J. This action has been brought by certain underwriters for the purpose of having it declared that two several policies of marine insurance, which were open policies, on shipments to be subsequently declared, were obtained by fraud and concealment of material facts, and to set them aside. There is a prayer in the alternative to take an account of what might have been at risk, but in my view of the case it is immaterial to consider that alternative form of relief. The circumstances under which this action was brought appear to be as follows:—A series of policies were obtained at Lloyd's to cover fruit and other produce

(1) Law Rep. 8 C. P. 18. (2) Law Rep. 9 Q. B. 531.

from Greece and the Ionian Islands, shipped to Liverpool or London in the autumn of 1875. There were four open policies; the first two dated the 3rd of September and the 1st of October; the two subsequent policies, as to which the present action is brought, were dated the 7th of October, and the 3rd of November, but based upon slips signed upon the 1st of October and the 5th of October, 1875, respectively. On the 5th of November, 1875, a steamer named the *Vindomora*, appears to have been sunk in the Thames, having a large and valuable cargo on board. A claim was made in respect of that loss, and that led to the institution of the present action. It appears to have been the practice of the present defendants in declaring upon the policies which they had effected to make those declarations for less amounts than the prices at which it was admitted they ought to have been made. The consequence was that at the time when the third or the fourth policy was effected, the earlier policies were, in fact, exhausted to a much larger extent than was disclosed. It would appear from the findings of the jury, on the questions submitted to them, that the declarations actually made were brought to the attention of the underwriters. The answer to the second question is, the defendants made such declarations falsely and fraudulently, and such declarations were material to the subscription of the policies of the 7th of October and the 3rd of November, and the plaintiff was induced thereby to subscribe them. The third finding is, the defendants concealed and abstained from declaring the amounts insured by the policy, and the fourth finding, that it was material to the underwriters to be informed of the risks so concealed and abstained from being declared. There was a non-disclosure of facts which were found by the jury to have been material to guide the underwriters in arriving at the determination whether in the first place they would accept the risk at all, and next, the price at which they were disposed to take it. It appears to me impossible to say in the face of these findings, that there was not a non-disclosure of a material fact within the meaning of the various decisions that have been come to. Under those circumstances it appears to me this appeal must fail.

BRETT, L.J. The question in this case is, whether two policies

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ought not to be declared to be ineffective as to any loss which might occur to the defendants, on the ground that at the time the negotiation of those policies was being carried on between the assured and the underwriters there was a concealment, and in this case a fraudulent concealment, of a material fact, and it seems to me the question would be precisely the same if the present defendants had, upon a loss occurring after the 1st of October, sought to recover in respect of that loss upon one or both of these policies. The concealment relied upon is this, these two policies are policies upon produce coming from abroad on ship or ships to be declared, these policies to succeed other named policies. There were previous policies, and upon those policies declarations were made which were improper declarations of the value of the produce shipped. They were not only improper declarations in the sense of being incorrect, but they were for a fraudulent amount, and the charge conveyed is this, that the goods shipped were declared after their arrival, and when they were therefore safe, at smaller values than they ought to have been declared at. The object of such fraud was that when the produce was safe, the defendants might make the premiums they had paid cover larger sums than they ought to have covered, and the effect was to make it appear that there was more to run out upon those policies in favour of the assured than was truly the case, so that when the last policies which are the subject of this action were being negotiated, the underwriters (assuming the old state of things on the former policies to be made known to them, as I think we must assume), would be led naturally to suppose, that the policies into which they were then entering could not be made effective until after there had been shipments to a considerable amount declared upon the other policies, whereas in fact there was only a very small sum to be realized on the former policies, so that the policies they were then entering into would be called into effect much sooner than they had a right to anticipate. That being so, the jury have in effect found that the concealment of this from the underwriters was the concealment of a matter which would affect the minds of rational underwriters of ordinary care and skill, upon the point whether they would enter into those policies or not, or at what rate of premium they would do so.

That I take to be the substance of the findings of the jury, and the question is whether there was any evidence to support such finding. It has been argued before us that there was not, because it was said that that knowledge, or the want of it, could have no effect upon the risk of the voyage, and a passage from Duer was cited in order to shew that the material fact, the concealment of which would avoid the policy, is only that which might add to or diminish that kind of risk. In the first place, it seems to me the decision in the House of Lords by Lord Eldon in *Sibbald* v. *Hill* (1) is directly contrary to that proposition. In that case the assured wished to confine himself to the mention of such facts as are now alleged to be the only facts that ought to be taken into account, and the Scotch judges held he could do so, but the House of Lords, by the advice of Lord Eldon, ruled to the contrary. The true proposition, I think, is laid down in Phillips on Insurance, section 531, when explained by Parsons. It seems to me the opinion of Lord Blackburn was that the text of Duer was wrong, and that the text of Parsons, combined with the text of Phillips, gives the right rule, and that that is in accordance with the decision in the House of Lords; so that the concealment which is to vitiate a policy is a concealment at the time of the negotiation of the policy of a material fact, which, if communicated, would affect the judgment of a rational underwriter in considering whether he would enter into the contract at all, or enter into it at one rate of premium or at another. Therefore the real question in the present case seems to me to be this,—can we say that it is unreasonable for a jury to suppose that a rational underwriter would, in considering whether he would accept these later policies or not, be governed by the knowledge of the amount for which declarations had been made upon the former policies. So far from thinking it unreasonable, it seems to me it is a matter which would govern the decision of any rational underwriter. Therefore I think the jury were perfectly entitled to find that the concealment was of a material fact. Here it was not only a concealment, but a fraudulent concealment, for the matter concealed was kept back from the knowledge of the underwriters in order that the assured might thereby derive an advantage. Being

(1) 2 Dow. 263.

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therefore fraudulent, it seems to me there should be no return of premium, and that the verdict and judgment are both right, and should not be disturbed.

COTTON, L.J. This was an action by underwriters upon two policies, one effected on the 1st and dated the 7th of October, and the other effected on the 5th of October and dated the 3rd of November. It was not disputed that there had been previous policies on shipments to be declared from time to time, and that the shipments under the previous policies which had been declared were of goods of a value considerably more than that at which they were declared. It is found by the second finding of the jury that the defendants made such declarations on the previous policies falsely and fraudulently, and that such declarations were material to be known to the underwriters, and that they were induced thereby to subscribe the policies the subject of this action. Then there is a further finding that the defendants abstained from declaring the amounts which had been on risk and insured by their previous policies, and as involved in this, I understand that the plaintiff and those for whom he sues knew the amount declared on the previous policies. Under these circumstances can these policies be maintained by the defendants? It was said the rule was that no concealment would vitiate a policy unless it was a concealment of a fact concerning the risk insured; but I agree with Brett, L.J., that that is not the correct rule. It certainly was not adopted in the case in the House of Lords, and was not adopted in *Ionides* v. *Pender*. (1) It is no doubt so laid down in Duer, but Lord Blackburn, in delivering judgment in *Ionides* v. *Pender* (1), did not approve of it, and said "the rule laid down in Parsons on Insurance, that all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act, seems to us a sound one." I agree with what Lord Blackburn there says. Here it is found the underwriters were induced to enter into the policies by the declarations of shipments on the previous policies. That involves this, that it was a material fact for them to know the real amount

(1) Law Rep. 9 Q. B. 531.

running on those policies. It is said that does not come within the rule. In my opinion it does, and I see no reason why we should say there was nothing to justify the finding of the jury.

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Judgment affirmed.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Hollams, Son, & Coward.*

MARSHALL *v.* BOLCKOW, VAUGHAN, & CO.

1881 *Jan.* 19.

C. P. D.

Ship—Demurrage—Loading and Unloading at fixed daily Rate—Right to include whole Time occupied in Loading and Unloading.

By charterparty between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage."

"If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day."

The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day:—

Held, that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the average amount of work done on each day.

APPEAL by motion, under 38 & 39 Vict. c. 50, s. 6, from a decision or certificate of the county court for Durham, holden at Sunderland.

The action, which was ordered to be tried in the county court under 19 & 20 Vict. c. 108, s. 26, was brought by the plaintiff to recover 64*l.* 9*s.* 10*d.* as demurrage due from the defendants, charterers of the ship *Florence Nightingale*. By the charterparty it was agreed that the vessel should proceed to Bilbao, and there load, where and as ordered by the agent of the freighter, a full and complete, or part cargo of iron ore, and therewith proceed

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with all convenient speed and deliver the same as customary where and as directed by the consignees or their agents, on being paid freight at the rate of 11*s.* 6*d.* per ton delivered at the Tees, Middlesborough, Eston, or Southbank. 400/500 tons per working day (Sunday and holidays excepted) to be allowed the charterer for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage. "If the vessel is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day, and time to commence day after vessel's arrival, provided she is then reported at the custom house, and in every respect ready for cargo."

It appeared that the ship duly proceeded to Bilbao, and was there ready to load her cargo at 5 P.M. on the 11th of February, 1880. She was loaded with a cargo of $752\frac{13}{20}$ tons, the loading being completed at 7 P.M. on the 17th of February, and the whole time occupied being 146 hours. She then proceeded to Middlesborough, being berthed at 5 A.M. on Sunday, the 29th of February, and her discharging was completed at 4 P.M. on Tuesday, the 2nd of March.

The only dispute between the parties was as to the amount of demurrage payable: the plaintiff contending that he was entitled to $85\frac{3}{4}$ hours at 15*s.* 6*d.* per hour, and the defendants claiming that they had a right to detain the vessel for loading and discharging 5 days and $\frac{1}{2}$ hour, or $120\frac{1}{2}$ hours, and consequently that they had only kept the vessel 7 days and 13 hours, or 181 hours, and were only liable to pay demurrage for $60\frac{1}{2}$ hours, for which they paid into court 45*l.* 17*s.* 6*d.*

The county court judge certified for 18*l.* 12*s.* 4*d.*, beyond the amount paid into court.

Finlay, for the plaintiff. Upon the true construction of this charterparty the stipulations as to the time for loading and unloading the vessel must be kept separate and distinct. In practice, where it is intended that the charterer shall be at liberty

to club the days for loading and unloading together, so as to save demurrage, a special clause is inserted in the charterparty. The provision that the captain is to have a lien for demurrage assumes that he is to have a right to demurrage at the port of loading.

Henn Collins, for the defendants. The defendants are not liable beyond the amount paid into court, for the rate at which the cargo was loaded and unloaded must be ascertained by taking an average of the time occupied at the ports of loading and discharge. The charterparty does not specify the number of lay days, but merely gives the data for ascertaining them. If a number of lay days, without more, had been specified, it is presumed that the whole time occupied in loading and unloading might be distributed between them. But the proviso which, under the circumstances, came into operation, created a uniform rate for loading and discharging, and the effect is the same as if a number of days had been allotted for both operations together.

LORD COLERIDGE, C.J. I think that our judgment must be for the plaintiff, on the ground that the intention to separate the time for loading and unloading the cargo is clearly established. What the charterparty says is: "400/500 tons per working day to be allowed the charterers for loading, and 300 discharging—if the vessel is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day." The vessel did load at a place other than Portugalette or Lucana shipping staithes. Now I do not understand the defendants' counsel to contend that, looking at the first clause as to loading and unloading, there would be any reasonable ground for saying that the parties meant that the days occupied in loading and unloading should be taken together for the purpose of seeing how much work was done each day. But he argues that the proviso—that if the ship is loaded at a different place, then the loading and discharging is to be at the rate of 300 tons per working day—does ascertain the number of working days and makes the clause the same as if it had fixed a number of lay days without making any distinction between loading and unloading. But I think that the effect of the proviso is rather to fix a separate number of days for loading and unloading respectively, in which

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case I apprehend the days could not be consolidated. We must construe the proviso with reference to the body of the contract, and there we find different rates of loading and unloading. A further reason for this construction is the clause giving a lien for demurrage. If the defendants' construction were correct the demurrage never could be ascertained until the cargo had passed out of the control of the master.

BOWEN, J., concurred.

Judgment for the plaintiff.

Solicitors for plaintiff: *Botterell & Roche.*
Solicitors for defendants: *Van Sandau & Cumming.*

1880
Nov. 16.

Ex. D.

DURRANT *v.* THE ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND WALES.

Money paid under Mistake of Fact—Delay in reclaiming—Alteration of Position of Payee.

11 QBD 845

The plaintiff, by mistake, paid to the defendants, who were owners of the tithes of a parish, tithe rent-charge in respect of lands not in his occupation. The plaintiff did not discover the mistake until the two years limited by 6 & 7 Wm. 4, c. 71 for the recovery of a tithe rent-charge had expired and the defendants had lost their remedy for the arrears against the lands actually chargeable:—

Held, that there was no duty cast on the plaintiff in relation to the defendants which made his delay in discovering the mistake laches on his part; and that he was entitled to recover back the amount paid as money paid under a mistake of fact.

SPECIAL CASE, stated by way of appeal from the judgment of the judge of the county court of Downham in favour of the plaintiff, in an action brought to recover back an amount of tithe commutation rent-charge paid to the defendants as rectors of the rectory of Crimplesham, under a mistake of fact.

The material facts appearing in the case were the following:—

Prior to Michaelmas, 1870, certain lands in the parish of Crimplesham, in Norfolk, were held by a Mr. Hodgkinson as tenant. At Michaelmas, 1870, the plaintiff succeeded Hodgkinson in his tenancy, except as to a part of the land called Stanks, consisting of about twenty-five acres, which was cut off and

thenceforward held separately. The action was brought to recover back tithe which accrued due between the 10th of April, 1874, and the 1st of October, 1876, in respect of Stanks, and was paid by the plaintiff to the defendants.

The defendants became owners in possession of the tithe of the parish of Crimplesham on the 10th of April, 1874. The names of the persons for the time being occupying the respective hereditaments subject to tithe were put down in the collecting book of the tithe owner's agent, which was used by the collector at the tithe audit. When Hodgkinson gave up his tenancy the name of the plaintiff was substituted in the collecting book of the then collector for that of Hodgkinson in respect of all the lands, including Stanks. From that time until April, 1874, the collector for the lessees, and afterwards the collector for the defendants, gave notices to the plaintiff, as an occupier of lands in the parish, to pay the tithe for the lands that appeared by the collecting book to be occupied by him, without any knowledge on his or their part that the plaintiff did not occupy the land called Stanks, or that the plaintiff was not liable to pay tithe for the same, being guided simply in the notices of audit by the list above mentioned.

The plaintiff paid his tithe according to the notices, in ignorance that the amount specified in the notices included the tithe for Stanks not occupied by him. The tenant of Stanks, who was liable under an agreement with the landlord to pay tithe, was not asked to pay for that land until after the plaintiff, in April, 1877, accidentally discovered that he was paying tithe for land not in his possession, and refused to pay it any more.

The question for the opinion of the Court was whether, under these circumstances, the plaintiff was entitled to recover back any and what part of the tithe so paid by him to the defendants?

F. M. White, Q.C. (*J. M. Lloyd,* with him), for the defendants. The defendants have lost their remedy against the lands chargeable with these tithes, since 6 & 7 Wm. 4, c. 71, ss. 81, 82 limits the time for recovery of arrears of tithe rent-charge by distress or writ of possession to two years. The plaintiff ought to have known the facts, and his laches has altered the position of the defendants,

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EX. D.

so as to debar him from recovering from them the money he has paid: *Freeman* v. *Jeffries* (1); *Cocks* v. *Masterman.* (2)

A. Wills, Q.C., for the plaintiff, was not called on.

POLLOCK, B. I agree in the decision arrived at by the county court judge in favour of the plaintiff. If the mistake, which was common to both parties, had been discovered within a certain time after the payment the defendants could have obtained the tithe from the tenant. The fact that the mistake was not discovered in time prevents this, and so alters the position of the defendants; but there is no conduct on the part of the plaintiff such as would disentitle him from recovering in this action. In *Cocks* v. *Masterman* (2) the ground of the decision was that the banker should bear the loss, because he had not done that which bankers are bound to do, given notice of the forgery of the cheque when it became due. This and other similar cases proceed upon the ground of some mutual relation between the parties creating a duty on the part of the plaintiff, breach of which disentitles him from recovering. No such state of facts exists here, and the plaintiff, having paid the money under a mistake of fact, is entitled to recover it back.

HAWKINS, J., concurred.

Judgment for the plaintiff.

Solicitor for plaintiff: *W. B. Brooks, for E. M. Beloe, King's Lynn.*

Solicitors for defendants: *Jennings, White & Co.*

(1) Law Rep. 4 Ex. 189. (2) 9 B. & C. 902.

CORRY *v.* THE GREAT WESTERN RAILWAY COMPANY.

1880
Dec. 10.
C. P. D.

Railway Company—Liability to fence against adjoining Lands—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 68—*Injury to Cattle —Owner releasing Right to accommodation Works—Rights of Occupier.*

The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847, the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a sufficient fence (consisting of posts and rails, a ditch, and a quickset hedge) between the railway and the land so occupied by the plaintiff, but neglected to keep up the posts and rails, and in consequence of their defective and dangerous condition a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land, fell into the ditch and was killed:—

Held, that the defendants were liable, for that their arrangement with the owner did not exonerate them from their liability under the Railways Clauses Act (8 & 9 Vict. c. 20) s. 68, to maintain the fence and ditch for the benefit of the occupier, and so as to prevent his cattle from straying from the land.

Case stated by the judge of the County Court at Yeovil.

1. This action is brought by the plaintiff to recover 30*l.* damages for the loss of a cow, the property of the plaintiff, which loss was caused by the defective and dangerous state of the fences of the defendants separating the railway of the defendants in the parish of Over Compton, Dorset, from a close of land in the occupation of the plaintiff in the parish.

4. The plaintiff is tenant from year to year to John Goodden or his trustees of a farm called Lower Farm. He became tenant thereof from year to year at some time prior to the making of the conveyance hereinafter mentioned, and he has occupied on the same terms, as a tenant from year to year, down to the present time.

5. One of the fields forming the farm of the plaintiff abuts on lands belonging to the defendants, through which lands the defendants' railway is constructed. Between the fields of the plaintiff and the lands of the defendants there exists a ditch. Between the ditch and the railway there was and is a sufficient fence to prevent animals from straying on the railway itself.

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6. On the afternoon of the 20th of July, 1879, one of the plaintiff's cows which on the morning of the same day had been left alive and in health in the field was found dead in the ditch. At the place where the cow was found the ditch is four feet six inches wide at the top and one and a half feet wide at the bottom, and about six feet deep, and was partially overgrown with brambles growing in the two sides of the ditch. The death of the cow resulted from its having fallen into the ditch, and being unable to extricate itself.

7. The ditch was made by the defendants at the time of the construction of their railway in or about 1846; and it had been cleared out by the defendants from time to time, but not for the last three years. When the ditch was made by the defendants they erected a post-and-rail fence between it and the field of the plaintiff; but, after a thorn hedge which the defendants had planted on the side of the ditch nearest the railway had grown up, the post-and-rail fence was allowed to rot away; and it has ceased to exist for many years. The ditch was on the 20th of July, 1879, in such a defective condition as to be dangerous to cattle placed in the field of the plaintiff; and the death of the cow was occasioned by the defective and dangerous condition of the ditch. There was no evidence that any similar accident had ever before occurred, or that any complaint had been made to the defendants of the condition of the ditch, or that they had ever been called upon to fence it from the field of the plaintiff.

9. The defendants tendered in evidence a conveyance dated the 14th of December, 1846, from John Goodden and his trustees of the land required for the defendants' railway at the place in question, with a receipt and plan indorsed thereon shewing the land acquired by the company.

10. The defendants also tendered in evidence an indenture of release, also dated the 14th of December, 1846, and made between Lord Portman and Sir W. C. Medlycott of the first part, John Goodden of the second part, and the defendants of the third part.

11. The judge held that the above-mentioned conveyance and the plan and indorsement thereon, and the above-mentioned indenture

of release were not admissible in evidence on behalf of the defendants, and he rejected them accordingly, and gave judgment for the plaintiff on the ground that the defendants, having made the ditch for the purposes of their railway, and having been in possession of it ever since, were bound to fence and maintain it in such a manner that it should not be dangerous to cattle using the adjoining land, and in fact that it was dangerous to such cattle.

12. Either party was to be at liberty to refer to the conveyance and release above-mentioned, and to the plan and receipt indorsed on the said conveyance and release (subject to the opinion of the Court as to their admissibility in evidence), and to any of the special Acts relating to the defendants' railway.

The questions for the Court were,—1. Whether, on proof of the above-mentioned facts, the plaintiff was entitled to judgment for 30*l.*, the value of the cow. 2. Whether the above-mentioned conveyance and release ought to have been admitted in evidence.

R. S. Wright, for the defendants. Apart from the liability imposed upon them by the statute 8 & 9 Vict. c. 20, there was no obligation on the company to fence the ditch in question, it not being so near to a highway as to make it dangerous to the public. By s. 68 of that Act it is enacted that "the company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway, that is to say" (amongst others), "sufficient posts, rails, hedges, ditches, mounds, or other fences, for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway; and such posts, rails, and other fences shall be made forthwith after the taking of any such lands, if the owners thereof shall so require, and the said other works as soon as conveniently may be." And there is a proviso that the company "shall not be required to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead

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of the making them." By the indenture which was offered in evidence at the trial, the land in question (amongst others) was conveyed to the company in consideration of 1863*l.* 15*s.*; and the grantors declared that such sum was in full satisfaction and recompense for the value of the hereditaments so conveyed, and in full compensation for any damage sustained or to be sustained by them, their heirs or assigns, by reason of the severing or dividing such lands, and also for and on account of any loss or inconvenience which they, their heirs or assigns, might sustain by reason of the execution of all or any of the said Acts, &c., "and also for all right, title, or claim to have any posts, rails, hedges, ditches, mounds, or other fences or works made or maintained by the company for separating the lands taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or occupiers thereof from straying thereout."

Having in 1847 compensated the landlords in respect of all damages that might result from insufficient fencing, the company cannot at this distance of time be under any liability to the tenant, who must be assumed to have consented to continue in the occupation of the land as it stood. Under ss. 119—122 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), the compensation payable to a person who is in occupation of the land as tenant from year to year, is limited to the extent of his interest, that is, one year and the period required for a notice to quit: *Ex parte Farlow*, (1); *Ex parte Palmer* (2); *Syers* v. *Metropolitan Board of Works.* (3) It never could have been intended that a more extensive right should be acquired by a tenant from year to year under this statute. At the time the fence in question was made it was sufficient for the protection of the plaintiff's land: the company were under no obligation to fence as against him in perpetuity. When they obtained the release from the landlord they were absolved from all further liability as soon as they had put up a fence of sufficient durability to fence as against the plaintiff during his term. The landlord could only grant to a new tenant such rights as he himself possessed.

(1) 2 B. & Ad. 341. (2) 9 Ad. & E. 463.
(3) 36 L. T. 277.

Petheram, *Q.C.*, for the plaintiff. The right of a tenant to have his land fenced as against the railway is not the subject of compensation at all under this Act. He would be entitled at any time to apply for a mandamus to compel the company to fence. Nothing having occurred to deprive the plaintiff of that right, it exists to the present time. But, apart from the statute, the fence (including a ditch, hedge, posts and rails) belongs to the defendants. They originally made it, and they have always until recently repaired and maintained it. This is conclusive as to the plaintiff's right to have it continued: *Lawrence* v. *Jenkins*. (1)

Wright, in reply.

DENMAN, J. I think, taking into consideration the evidence which the county court judge rejected, but which we have now before us by consent, his decision was correct and his judgment must be affirmed. The facts are these. When the railway was first formed the company, being bound under the Act of Parliament to make a sufficient fence for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway, cut a ditch and planted a quickset hedge on their own side of the ditch. That, though sufficient when the quickset hedge grew up to protect the railway from trespass, was not sufficient to prevent cattle from straying from the adjoining land, and the company accordingly put up posts and rails on the outer edge of the ditch, and, as we must assume from the statements in the case, upon their own land. These posts and rails in the course of time through neglect to keep them repaired rotted away, so that the ditch became dangerous to cattle placed in the plaintiff's field; and, as the case finds, the death of the plaintiff's cow was occasioned by the defective and dangerous condition of the ditch. I gather from the case that one of the sources of danger arose from the sides of the ditch becoming overgrown with brambles which so obscured it as to make it a sort of trap. Practically, therefore, the question is reduced to this, whether the death of the cow was caused by the absence of the posts and rails,

(1) Law Rep. 8 Q. B. 274.

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and whether the company are liable for not maintaining them. It is conceded that the company did not maintain the posts and rails, though they occasionally cleansed the ditch. What, then, was their duty? It appears to me that it was their duty, under s. 68 of the Railways Clauses Consolidation Act, 1845, to make and to maintain a sufficient fence to protect the cattle of the owner or occupier of the lands adjoining their railway from straying thereout. They have clearly failed to perform that duty, and, unless there is something in the proviso at the end of s. 68, which has been relied upon by Mr. Wright, to absolve them from its performance, they are responsible for the breach of that duty. The proviso is as follows:—"Provided always that the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway, nor to make any accommodation works with respect to which the owners and occupiers of the lands shall have agreed to receive and shall have been paid compensation instead of the making them." It was argued on behalf of the defendants that the indentures of the 14th of December, 1846, prevented the plaintiff from having a right of action for the loss of his cow, because at the time the fence was made the owner of the land had received compensation and had released the company from the obligation to fence as against him; and that any right of a tenant from year to year to have the fence made and maintained by the company would not in any event be more extensive than the right of a tenant to compensation for the compulsory taking of his land under the Lands Clauses Consolidation Act, 1845. I think this argument cannot prevail against the plain words of the 68th section. It seems to me to be unjust to deprive the plaintiff of his remedy for damage caused by the company's neglect in regard to the fence, because they have compensated his landlord for the release of his rights in that respect. This is a defence which the company were bound to make out clearly. They have failed to do so, and therefore I think the judgment of the county court should be affirmed.

LINDLEY, J. I am of the same opinion. The question presented for our decision in this case is by no means free from difficulty.

We are not informed whether the post-and-rail fence was made by the railway company in pursuance of the Railways Clauses Consolidation Act. The Act, however, imposed upon the company the duty of putting up a sufficient fence for separating the land taken for the use of the railway from the adjoining lands not taken, and protecting such lands from trespass, or the cattle of the owners or the occupiers thereof from straying thereout by reason of the railway. We may, therefore, I think, assume that the fence in question was made in performance of that statutory duty. Look at the position of the plaintiff, then. He was the occupier as tenant from year to year of the land adjoining the railway, and as such was entitled to have a sufficient fence to prevent his cattle from straying. He never lost that right by the acceptance of compensation. The company having at the time they took their land made a proper and sufficient fence, he could require nothing more. But, being entitled to have the fence made, he had a right to have it kept in an efficient state. For how long? Not, it is said, as long as his tenancy might last, but only until the period had elapsed during which he had a legal right to remain in the occupation of the land as such tenant, as against his landlord; for, that he could have no better or larger right than could be acquired by any succeeding tenant who might come in after the landlord had received compensation and had released the company from the performance of their statutory duty. That undoubtedly raises a very difficult question. But, upon the best consideration that I can bring to the matter, I think it would be straining the words of the statute to hold that an occupier who had a right to have his land protected by a fence has lost that right by reason of an agreement made by his landlord with the company to abstain from enforcing the obligation imposed upon them by the statute. I see nothing in this case to deprive the plaintiff of the benefit which the statute intended to confer upon him. The case of *Lawrence* v. *Jenkins* (1) turned upon the prescriptive right to have the fences kept up. This is a right referable entirely to the statute. I think the indentures ought to have been admitted. Having them before us, the conclusion I come to is that this appeal should be dismissed, with costs; but,

(1) Law Rep. 8 Q. B. 277.

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inasmuch as it is brought to try a question of much importance we think the defendants should have leave to appeal.

Judgment accordingly.

Solicitors for plaintiff: *Warry, Robins, & Burges, for Messrs. Ffooks, Sherborne, Dorset.*

Solicitor for defendants: *R. R. Nelson.*

Dec. 20.

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THE ATTORNEY-GENERAL *v.* THE EDISON TELEPHONE COMPANY OF LONDON (LIMITED).

Telegraph—Telephone—Postmaster-General—Telegraph Acts, 1863 (26 & 27 *Vict. c.* 112), *s.* 3; 1868 (31 & 32 *Vict. c.* 110); *and* 1869 (32 & 33 *Vict. c.* 73), *ss.* 3, 4, 5, 6.

Edison's telephone, for which patents were granted in 1877 and 1878, consists of a transmitter, a wire, and a receiver. When sounds are spoken into the transmitter, electric currents of varying intensity pass along the wire, so that corresponding or equivalent sounds are heard at the receiver, and two persons at a distance can thus converse with one another. A company leased these telephones to subscribers at yearly rents which produced a profit to the company, and arranged the wires so that subscribers could converse with one another when put into communication by a servant of the company:—

Held, that Edison's telephone was a "telegraph" within the meaning of the Telegraph Acts, 1863 and 1869, although the telephone was not invented or contemplated in 1869.

Held, also that a conversation through the telephone was a "message," or at all events a "communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those Acts; and that since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the Postmaster-General by the Act of 1869, and were not within the exceptions mentioned in s. 5.

INFORMATION. The facts and arguments appear in the judgment.

Sir H. James, A.G., Sir F. Herschell, S.G., E. E. Kay, Q.C., C. T. Simpson, W. W. Karslake, and *Moulton,* for the Crown.

Benjamin, Q.C., R. E. Webster, Q.C., and *Cozens-Hardy,* for the defendants.

Cur. adv. vult.

1880. Dec. 20. The judgment of the Court (Pollock, B., and Stephen, J.) was read by

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STEPHEN, J. This was an information filed by the Attorney-General against the Edison Telephone Company of London (Limited), and heard before my Brother Pollock and myself on the 29th of November and four following days. The facts were not in dispute, and they were as follows:—

The defendant company was formed in August, 1879, for the purpose of working two patents granted to Mr. Edison, namely, one on the 30th of July, 1877, "for the invention of improvements in instruments for controlling by sound the transmission of electric currents, and the reproduction of corresponding sounds at a distance;" and the other, on the 15th of June, 1878, "for the invention of improvements in telephones and apparatus employed in electric circuits." The nature of the instruments patented, and the manner in which they are used by the company are as follows: The telephonic apparatus consists of three parts, namely —first, an instrument called a transmitting instrument, into which a person speaks: secondly, an ordinary telegraphic wire through which an electric current passes; thirdly, an instrument called a receiving instrument, at which another person hears sounds. The transmitting instrument consists of a mouthpiece, into which the person using the instrument speaks; a tympanum or disc, which vibrates under the impulse of the words spoken; and a substance brought into the lightest possible contact with the tympanum, and also brought into relation with the electric wire, the nature of which substance is such, that the vibrations of the tympanum are by its means represented by variations in the electric current in the wire. The wire is exactly like any other telegraphic wire. The receiving instrument consists of a cylinder of chalk, which is damped by some chemical liquid, and is capable of being made to revolve by clock-work; a metal disc which touches the cylinder of chalk; and a tympanum. When the apparatus is to be used, the chalk cylinder is made to revolve, whereby friction is produced between the surface of the cylinder and the disc which touches it. The electric current passes from the wire into the chalk, and as it passes decomposes a part of the liquid, by which the chalk is moistened. The amount of decom-

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position is greater or less according to the variations produced in the current by the vibrations of the tympanum at the transmitting end. The decomposition of the fluid varies the degree of friction between the chalk cylinder as it revolves and the metal disc applied to it. These variations are represented by vibrations in the metal disc, and these vibrations cause the tympanum at the receiving end to vibrate in correspondence with the vibrations of the tympanum at the transmitting end, and so to emit sounds equivalent to those which are uttered at the transmitting end. The sounds so reproduced differ from the sounds uttered by the speaker, but they reproduce these sounds with such precision and completeness, that the voices of different speakers at the transmitting end can be recognised and distinguished from each other at the receiving end. This account of the apparatus used by the Telephone Company would, of course, be altogether incomplete for scientific purposes, but it is, we think, sufficient for the purpose of explaining our judgment.

We must now state the manner in which the apparatus described is used by the company. They have a central office in Queen Victoria Street, called the Central Exchange. They have also district offices in various parts of London called District Exchanges, and from the District Exchanges wires run to the houses or offices of subscribers in the neighbourhood. At each exchange, district or central, is an instrument called a switch board, by which any two wires running from that exchange can be connected with each other. The switch board is an instrument well known in telegraphic operations, and is constructed as follows: The wires running to the place where it is kept are brought down in front of the switch board in a vertical direction and parallel to each other. Behind, but not in contact with them, are horizontal wires. If it is desired to connect any two of the vertical wires, a metal peg is pushed through a hole in each of the vertical wires to be connected till the peg touches the horizontal wire running between and behind the vertical wire. The electric current in the first vertical wire then passes down the peg put through that wire, along the horizontal wire, up the peg passed through the second vertical wire, and along the second wire. If a subscriber, A. wishes to communicate with another subscriber,

B., the process is as follows: A. first attracts the attention of a servant of the company, stationed at the District or Central Exchange, as the case may be. He does this by pushing a button, by means of which an electric current lifts a spring, which keeps in position a small metal shutter, covering a number corresponding to A.'s name. The shutter falls. The servant upon this sees A.'s number, and connects his own receiving instrument with A.'s wire. A. thereupon names the person to whom he wishes to speak, namely, B. The servant puts A.'s wire in communication with B.'s wire, and shuts the shutter which had been opened, and A. and B. converse. When their conversation is over, one or both pushes his button and causes his shutter to fall, upon which the servant disconnects the wires.

If the subscribers' wires are each connected with the same District Exchange, the words spoken pass over three separate wires, or portions of wire, which may belong to three different people, namely, A.'s wire, which may belong to or be rented by A., the small length of wire on the switch board, which belongs to the company, and B.'s wire, which may belong to or be rented by B. If A. and B. have to communicate through the Central Exchange, the words spoken would pass over five separate portions of wire, namely—first, A.'s wire, to the District Exchange, with which A. communicates; second, the company's trunk wire from the District Exchange to the Central Exchange; third, the small portion of wire on the switch board at the Central Exchange; fourth, the company's trunk wire between the Central Exchange and the District Exchange, with which B. communicates; and, fifth, B.'s wire to the District Exchange, with which B. communicates. Of these numbers, 2, 3, and 4 belong exclusively to the company, No. 1 may belong to or be rented by A., and No. 5 by B. Agreements are made between the company and its subscribers, by which the wire and the telephonic apparatus necessary for working it are leased to the subscriber at a rent in consideration of which the company contract, among other things, that they will, "Upon request made through the said telephone at any time during the continuance of this agreement, between the hours of 9 A.M. and 6 P.M., Sundays excepted, put the lessee in telephonic communication with the telephone of any other subscriber to the

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said exchange whose wire is free." The rents are so calculated as to leave a profit for the company after paying the expenses of maintenance, &c.

The information charges that the use in this manner of the apparatus described is an infringement of the exclusive privilege of the Postmaster-General as to the transmission of telegrams. We must now consider what that privilege is. It is created by the 4th section of the Telegraph Act, 1869 (32 & 33 Vict. c. 73), in these words: "The Postmaster-General . . . shall . . . have the exclusive privilege of transmitting telegrams within the United Kingdom of Great Britain and Ireland, . . . and shall also within that kingdom have the exclusive privilege of performing all the incidental services of receiving, collecting, or delivering telegrams except as hereinafter provided." The 3rd section defines the words employed as follows: "The term 'telegram' shall mean any message or other communication transmitted or intended for transmission by a telegraph. The term 'telegraph' shall, in addition to the meaning assigned to it in the Telegraph Act, 1863, mean and include any apparatus for transmitting messages or other communications by means of electric signals." The Telegraph Act of 1863 defines "telegraph" thus: "The term 'telegraph' means a wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube or pipe enclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication."

Putting these enactments together, and substituting the definitions given for the words defined, the material part of s. 4 of the Act of 1869 will stand thus: "The Postmaster-General shall have the exclusive privilege of transmitting messages or other communications transmitted, or intended for transmission, by any wire or wires used for the purpose of telegraphic communication, with any casing, coating, tube, or pipe inclosing the same, and any apparatus connected therewith for the purpose of telegraphic communication, or by any apparatus (other than such wire) for transmitting messages or other communications by means of electric signals." In simpler language, the Postmaster-General is to have the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected

therewith used for telegraphic communication, or by any other apparatus for transmitting messages or other communications by means of electric signals. The result of the definition seems to be that any apparatus for transmitting messages by electric signals is a telegraph, whether a wire is used or not, and that any apparatus, of which a wire used for telegraphic communication is an essential part, is a telegraph, whether the communication is made by electricity or not. It would include, on the one hand, electric signals made, if such a thing were possible, from place to place, through the earth or the air: and on the other, a set of common bells, worked by wires pulled by the hand, if they were so arranged as to constitute a code of signals. By s. 6 of the Act of 1869, "any company, corporation, or person who transmits, or aids, or is concerned in transmitting any telegram in contravention of the exclusive privilege" above referred to is rendered liable to a penalty of 5*l.* for every such offence. Penalties are not asked for by this information, but the allegation made by it is that an offence has been committed, and the question for our determination is, whether this is or is not the case.

The case for the Crown is that every such conversation as the one which we have supposed to take place between A. and B. is a "message or other communication transmitted by wire used for the purpose of telegraphic communication with certain apparatus (namely, a transmitting and a receiving instrument) connected therewith for the purpose of telegraphic communication;" and that whenever such a conversation takes place the speakers and the company, by their servant, transmit, and that the company, at all events, aid and are concerned in transmitting such a message or communication. More particularly, it was argued that every member of this definition is satisfied by such a conversation so carried on. The conversation must be a communication, even if the word "message" is less appropriate. It is "transmitted" or sent through a wire used for the purpose of communication, and that communication is telegraphic according to the common use of language, though it involves no writing. The various affidavits filed give a complete history of the word "telegraph," and shew that from the first invention of semaphores till within the last few years no contrivance of the sort did literally write at a distance,

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but that the word was applied to a variety of contrivances which, by signals perceptible sometimes by the sense of sight and sometimes by the sense of hearing, conveyed intelligence to great distances in a much shorter time than a letter could be carried. On these grounds it was said that to hold such a conversation as described was to transmit a telegram within the meaning of the Act. As to the exceptions, it was contended for the Crown that the burden of bringing the case within one or more of them was upon the defendants, which is no doubt correct.

The arguments for the defendants may be reduced to three points: first, no communication by telephone is a telegram, because a telephone and a telegraph differ essentially; secondly, when two persons converse by means of a telephone they do not transmit a message or communication within the meaning of the Telegraph Act of 1869; thirdly, if such a conversation is the transmission of a message or communication within the Telegraph Act of 1869, it is within either the first or the second of the exceptions in s. 5 of the Act of 1869. The first contention was supported by the following arguments: It was argued that telephonic communication consisted in the transmission of the human voice to distances greatly exceeding those to which it can naturally reach by means altogether unknown in 1863, or even in 1869, when the Telegraph Acts were passed which we have to construe, and this, it was said, is an entirely new result, produced by entirely new means. The transmitting instrument is, it was argued, quite new, the method of varying the force of the current in the wire by collecting and impressing upon it the vibrations of the human voice having been altogether unknown before the inventions of Mr. Graham Bell and Mr. Edison. In the same way the receiving instrument is absolutely new. In 1869 means were no doubt known by which the interruption and re-establishment of an electric current at the transmitting end of a wire would cause sound mechanically at the receiving end, but in such cases the sound was created at the receiving end—as, for instance, by magnetising and demagnetising a piece of iron, which when magnetised drew down on itself a small steel bar with a click, which resumed its position by means of a spring when the magnet ceased to act as such; but the transmission of the actual vibrations of the voice through the length

of the wire and their re-translation into sound at the receiving end were unknown till the recent invention. Thus the means used were entirely new, and so was the result produced.

This is forcibly stated in various affidavits made by men of the highest scientific eminence. Sir W. Thompson says, "When the Telegraph Acts were passed the telephone had not been invented, and no one concerned in that legislation had the slightest idea, nor had any one living the slightest idea, that it would be possible so to extend the power of speech as to enable persons at a distance to converse with one another." Professor Stokes says, "Neither the transmitter nor the receiver of the telephone in any way resemble in their mode of operation the corresponding parts of a telegraphic instrument, and if a single word is to be used to include both a telephone and a telegraph it must, in my opinion, be wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information." Professor Tyndall says, "Prior to the labours of Bell and Edison it had never to my knowledge entered into the thoughts of scientific men to transmit by means of electricity the tremors of the human voice, so as to reproduce audible and articulate speech at a distance. The proof that this was not only possible but practical appeared to those most familiar with experimental physics to be an application of electrical and acoustical science not only new but marvellous. I have, therefore, no hesitation in expressing the opinion that to confound the telephone with the telegraph would be to place in the same category utterly dissimilar things." Dr. Fleming, who has been engaged for many years in the study of the subject, says, "The Edison telephone is only a complicated form of speaking trumpet;" and he also says, "When I, standing in one closed room, shout to another person in an adjoining room, the waves of sound from my voice beat against the wall, transmit their motion to the particles of the wall, and these again hand on the motion to the air in the other room. In this case the molecules of the wall constitute an apparatus by which motion of the air in one place is repeated in another. The Edison telephone does just the same thing." So Lord Rayleigh says, "The speaking telephone is an instrument for artifically extending by the use of electricity the

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limits through which the human voice is audible. . . . The only essential difference between a speaking telephone and a speaking tube is, that in the former vibrations are transmitted in the electrical, in the latter in the aerial, form." Mr. Hopkinson says much the same at greater length.

We see no reason to doubt the statements of these distinguished men as to the novelty and other scientific merits of the transmitting and receiving instruments. Our attention was certainly called to a remarkable passage in a work by the Viscomte du Moncel, published in 1857, which no doubt suggests the possibility of such a contrivance as the telephone. Much evidence was also given as to an instrument invented in 1861 by a German named Reiss, which, it was contended, had more or less analogy to the telephone; but to these matters we attach no importance, because we cannot see in the speculations of Du Moncel, or in what was done by Reiss, anything that can be said, either in science or practice, to have anticipated the telephone of Edison or of Bell. Whether it is correct to speak of the telephone as actually transmitting sound, and as being in the nature of a speaking trumpet or speaking tube, seems much more questionable. Sir George Airy, Professor Adams, and Mr. Siemens expressly deny it, for reasons which we need not quote at length. Sir George Airy gives his reason in a very few words: "I do not believe that any such identity can be proved or reasonably stated to exist, and this I say for the reason that while we know the laws governing and the nature of the process which takes place during the transmission of sound through air, we really know nothing as to the nature and mode of operation of electric currents, or waves, or impulses, or tremors."

It was argued that no sound at all is perceptible between the transmitting and the receiving instrument; that the sound produced at the receiving end is produced not by the voice uttered at the transmitting end, nor by the vibrations set up by the voice in the electric current in the wire, but by the vibrations of the metal disc caused by the variations in the friction between the disc and the chalk cylinder. It was further said that the sound heard at the receiving end differs in a marked way from the sound uttered at the transmitting end, and that though the difference

between two voices can be recognised at the receiving end, this no more proves identity between the sounds uttered and the sounds heard than the fact that you can distinguish the photograph of A. from the photograph of B. proves identity between the faces of A. and B. and the photographs of A. and B. respectively. A consideration not mentioned during the argument may perhaps be added. The telephone in the transmission of sound substitutes the velocity of electricity for the velocity of sound. If the sound made by the voice reached the receiving instrument of the telephone, it would reach it long after the telephone had spoken, and it seems difficult to say that two sounds separately heard one after the other are each identical with the sound uttered, especially when the one which arrives first makes a different impression on the ear both from the words as spoken and from the words as first heard. Mr. Cromwell Fleetwood Varley mentions that he and his brother arranged two parabolic sounding boards in such a manner that they were accurately directed towards each other, and that words spoken by one brother into the focus of the one parabola were heard by the other brother at the focus of the other parabola, at a distance of over two miles. It would take about eight seconds for the sound to traverse this distance. If, therefore, the words had been spoken into a transmitting instrument at one focus in telephonic connection with a receiving instrument in the other focus, the one sound would have been heard eight seconds before the other. Can it be said that the two sounds were one and the same sound, or that the one sound travelled simultaneously over the two intervals of space at two different rates of speed?

We do not think it necessary to express any opinion on a controversy which is more scientific than legal, and perhaps more properly metaphysical or relative to the meaning of words than scientific, as it seems to turn upon the nature of identity in relation to sound. It is enough to say that, whatever may be the merits of the controversy, it does not appear to us that the fact, if it is a fact, that sound itself is transmitted by the telephone establishes any material distinction between telephonic and telegraphic communication, as the transmission if it takes place is performed by a wire acted on by electricity. We are of opinion,

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then, that, fully admitting all that has been, or indeed can be said as to the novelty and value of the telephonic transmitter and receiver, the whole apparatus, transmitter, wire and receiver, taken together form "a wire used for the purpose of telegraphic communcation, with apparatus connected therewith, for the purpose of telegraphic communication"—that is, they are a telegraph within the definition of the Act of 1863, which is embodied by reference in the Act of 1869. The wire is a wire. The transmitting and receiving instruments are apparatus connected therewith for the purpose of conveying information by electricity; and this, as it seems to us, is telegraphic communication. Indeed, though for scientific purposes it may, no doubt, be necessary to distinguish between telegraphs and telephones, it seems to us that the word "telegraph," as defined in the Telegraph Acts, is (to use Professor Stokes's words) "wide enough to cover every instrument which may ever be invented which employs electricity transmitted by a wire as a means for conveying information." Indeed, looking to the extension of the definition inserted in the Act of 1869, the words "transmitted by a wire" might probably be left out of this definition.

That this view does no violence to the common use of language is proved, first, by the fact that in Mr. Edison's own specification the words "telegraph" and "telegraphic" are frequently used in reference to his invention, and that in Webster's Dictionary, published in 1856, an electro-magnetic telegraph is defined (under the head "Telegraph") as an "instrument or apparatus for communicating words or language to a distance by the use of electricity;" and (under the head "Electro-magnetic telegraph,") as "an instrument or apparatus which, by means of iron wires conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning."

Of course no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but it is highly probable that they would, and it seems to us clear that they actually did, use language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence. The great object of the Act of 1863 was to give special powers to telegraph companies to enable them to open

streets, lay down wires, take land, suspend wires over highways, connect wires, erect posts on the roofs of houses, and do many other things of the same sort. The Act, in short, was intended to confer powers and to impose duties upon companies established for the purpose of communicating information by the action of electricity upon wires, and absurd consequences would follow if the nature and extent of those powers and duties were made dependent upon the means employed for the purpose of giving the information. Suppose a company found it essential to erect posts along a highway, and suppose the body having control of the highway gave their consent, would the validity of the consent, and therefore the liability of the parties concerned to an indictment for obstructing the highway, notwithstanding such consent, be dependent on the question whether the messages were sent by an Edison's transmitter or by a Morse key? Or, again, suppose that the company favoured particular customers, and so enabled their friends to get great advantages in trade or speculation over other persons, could they say, "We have a right to do so, notwithstanding s. 41, because we use telephones and not telegraphs?" Or, still more, if one of their clerks negligently refused to send a message or improperly divulged its contents, would they, for the same reason, be deprived of the summary remedy given by s. 45? Nearly every section of the Act would supply an additional illustration of the general conclusion that, but for the monopoly established in 1869, the Edison Telephone Company would be as anxious to be included in the Act of 1863 as they are at present to be excluded from it; but this is only an accident, which cannot affect the interpretation of the Act.

Looking at the Acts from the point of view of the Crown, we are led by a different road to the same conclusion. If a telephone is not a telegraph, then a telephonic communication is not a telegram, and if so, any company may not only transmit such messages, but may perform all the incidental services of collection and delivery; and if this is so there is nothing to prevent all the railroad and other companies in possession of telegraphs from applying to them telephonic transmitters and receivers, and carrying on the business of telegraphy just as they did before 1869. The customer would write his message at the counter and the

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clerk would speak it through the telephone instead of using a less perfect instrument. It is difficult to suppose that the legislature intended to grant a monopoly so liable to be defeated, or that its language was meant to be so construed as to be limited to the then state of, perhaps, the most progressive of all sciences.

In this connection we may dispose of one or two minor arguments by which it was attempted to draw a distinction between telephonic messages and telegrams. It was said to be essential to a telegraphic message that it should be sent not direct from party to party, but through the intervention of a messenger or clerk, and also that it should consist of signals having a conventional meaning, and not of actual words spoken. It seems to us impossible to regard these matters as essential to the process. A clerk may be regarded merely as an extra link in a chain of communication, and signals are only imperfect substitutes for words. It would be a strange thing to say that improvements by which a step in a given process can be dispensed with, and by which the process itself may be perfected, destroy the character of the process. To take such a view would be to affirm that imperfections in an instrument are essential parts of it, and that their removal destroys it. Apart from this a practical difficulty arises. There has been a constant progress in the subject of electric communication from its first invention to the present day. Some of the means employed require no code of signals, and some can be worked by any one who can read and write, without any assistance from clerks. The A B C instrument worked by moving a hand successively to all the letters forming the message, and this moved a corresponding hand at the other end of the wire. Any two persons who could spell could use these instruments. Hughes's type-printing instrument prints the message in capital letters on a long narrow strip of paper. A telegraph called Cowper's writing telegraph has lately been invented, the nature of which is that a person holding a pencil at one end of the wire can write or even draw with it, and that a facsimile is produced by a corresponding pen set in motion by the electric current at the other end of the wire. Two papers were produced before us written in what was said to be Chinese character, and exactly resembling each other. The one was written by a Chinese lady,

and the other by the pen at the other end of the wire. Now, either these instruments are telegraphs and the messages sent by them telegrams within the Act, or they are not. If Cowper's writing telegraph is within the Act, it is difficult to say why a telephone is not. They equally dispense with clerks or messengers. If the sound is in any sense transmitted in the one case, the motions of the hand are in the same sense transmitted in the other. The one reproduces actual written words quite as accurately as the other reproduces words spoken, and if the one can properly be described as a complicated speaking trumpet, the other can with equal propriety be described as an elongated pen. If, on the other hand, Cowper's writing telegraph is not within the Act, it is equally difficult to say why Hughes's type-printer is within it. It requires no messenger or servant, at least at the receiving end, and it employs no special code of signals. It is, however, impossible to doubt that it is included, for it was in common use long before the Act of 1869, having been invented in 1854, and having procured the Grand Prix for its inventor at the Paris Exhibition of 1867. The result seems to be that it is impossible to draw the line between these instruments, and that all or none must be regarded as coming within the definition of the term "telegraph" so often referred to. For all these reasons, we hold that a telephone is a telegraph within the meaning of the Acts of 1869 and 1863.

The second point made by the defendant company was that, whether the telephone was a telegraph or not, the conversations held through it were not "messages or communications" sent by a telegraph within the meaning of the Act. This contention was founded partly on the argument that the directness of communication between the parties to the conversation rendered the word "message" inappropriate, and partly on the Telegraph Acts of 1863 and 1868, which it was said, use the word "message" in the sense of a substance with a message written upon it, and on the Telegraph Act of 1869, which, it is said, uses the word "communication" in a peculiar sense. As to the word "message," it is, no doubt, true that in several sections it is so used; but in others it seems to us to be used in the sense of the purport or tenor of the message. It is, for instance, an

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offence to delay to "transmit or deliver" a message. "Transmit" obviously applies to the words and not to the paper; "deliver" to the paper and not to the words; and so in other cases. The same remark applies to the Act of 1868, in which the word "message" is frequently used, and which was commented upon by Mr. Webster minutely. All the difficulties raised or attempted to be raised appear to us to be capable of solution by the single principle already stated. The word "communication" in the definition of "telegram" given in the Act of 1869 was said to have found its way there from s. 16 of the Act of 1868, which authorizes the Postmaster-General to make contracts with the proprietors of newspapers and others for the transmission or delivery of "telegraphic communications" to them at certain times and on certain terms; and it was rather suggested than expressly argued that such communications only would be telegrams within the meaning of the definition of the Act of 1869. We do not agree with this view. The use of the word "communication" instead of message in s. 16 of the Act of 1868 certainly favours the opinion that there might be communications which would not be properly described as messages; but there is nothing in the definition of a telegram in the Act of 1869 which suggests that the word "communication" which it contains is to be restricted to the communications mentioned in s. 16 of the Act of 1868. It is very possible that the use of the word in the one section may have suggested its use in the other; but there is nothing to narrow its sense in the last-mentioned section. For these reasons we hold that a conversation held through a telephone is either a message, or, at all events, a communication transmitted by a telegraph, which is the definition of a telegram.

A small question was raised on the word "transmitted." When one person speaks to another it was said he "makes," but does not "transmit," a communication. The answer is, that when he speaks through a wire some miles long he sends what he says through the wire, or transmits it. As the defendants contended that the very voice itself was so sent, this seems specially clear as against them.

It was further argued that, admitting the conversations in question to be telegrams, they were still not within the Act of

1869, because the preamble of that Act recites that "similar powers to those conferred upon the Postmaster-General with respect to the exclusive privilege of conveying letters should be enacted with reference to the transmission of public telegraphic messages." This, it is said, confines the exclusive privilege as to telegrams within the limits within which the exclusive privilege as to letters is confined, and subjects it to the same tacit exceptions. But the exclusive privilege of the Postmaster-General as to letters is "the exclusive privilege of conveying from one place to another all letters" (7 Wm. 4 and 1 Vict. c. 33, s. 2) subject to certain exceptions. No express exception applies to the case of a man who carries his own letter with his own hand to the person to whom it is addressed. Yet this exception has always been regarded as tacitly implied in the Act, and no one ever supposed that a man who came within it violated the Postmaster-General's exclusive privilege. It was argued that, in like manner, if two friends communicated with each other directly by a telegraph of which they were joint owners, they would be outside of the sphere of the Act of 1869. To this argument there are, in our opinion, several conclusive answers. In the first place, we do not think that the recital in the preamble of the Act of 1869 ought to have the effect ascribed to it. Each Act must be construed independently. The practical inconvenience of construing the Post Office Act literally would be so very great that it can never have been seriously proposed so to construe it. It is enough to say that such a construction would have involved the consequence that when a letter was written it must be left on the table at which it was written till the postman called and took it away, visiting every room in every house for that purpose. Such a consequence is an absurdity; but there is no absurdity in supposing that the legislature meant to prohibit private electric telegraphs. The extent to which they were intended to be prohibited will appear from the exceptions to be considered immediately. In the next place, there is no real analogy between a man carrying his own letter to his correspondent's house and two men telegraphing to each other. In the one case the act done can, by no conceivable means, injure the revenue. In the other case an apparatus must be employed which may readily be made to injure the revenue. The object of

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the Post Office Act is to give to the Postmaster-General an exclusive right to earn all that can be earned by carrying letters; but a man cannot pay himself for carrying his own letter. If he gets a friend to carry it for him he might pay, and this case is accordingly provided for by an express exception. In the third place, the customers of the Telephone Company do not in fact communicate directly with each other. They are put in communication by a servant of the company, and their messages travel in all cases over at least one wire, and in many cases over three separate wires, which are the property of the company. On all these grounds we hold that the conversations held through the telephone are infringements of the Postmaster-General's exclusive privilege, unless they can be shewn to be within the exceptions to that privilege.

We now pass to the exceptions. Those which are said to apply are the first and second in s. 5 of the Act of 1869. The first is in these words: "Telegrams in respect of the transmission of which no charge is made, transmitted by a telegraph maintained or used solely for private use, and relating to the business or private affairs of the owner thereof." The second is: "Telegrams transmitted by a telegraph maintained for the private use of a corporation, company or person, and in respect of which, or of the collection, receipt and transmission or delivery of which no money or valuable consideration shall be, or promised to be, made or given." These exceptions resemble each other so closely that it is not easy to put a case of a telegram which would fall within the first exception, and which would not fall within the second. Every "telegraph maintained or used solely for private use" must be a "telegraph maintained for the private use of a corporation, company, or person." A "telegram for which no charge is made" does not differ materially from a "telegram in respect of which, or of the collection, receipt and transmission or delivery of which, no money or valuable consideration shall be or promised" (the words "shall be" seem to be wanted before "promised") "to be made or given." And a message "relating to the business or private affairs of the owner" of the telegraph by which it is sent is a telegram. Thus the second exception seems to contain everything which can fall within the first and nothing more, except possibly telegrams not

charged for transmitted by a telegraph used solely for private use and relating to the business of the owner of the telegraph, such telegraph not being maintained by the owner. But no case occurs to us in which a man is likely to own a telegraph and use it exclusively for his own business and yet not to maintain it. Some light may perhaps be thrown upon the subject by an obscure provision in the first exception. This exception authorises individuals to keep telegraphs for their own use, and to send messages by them relating to their own affairs so long as no charge is made for the messages. This condition is, as it stands, unintelligible. How could a man make a charge to himself for sending a message on his own telegraph about his own affairs? It suggests that the exception may have been originally intended to provide for two classes of telegrams sent by telegraph maintained or used solely for private use, namely, first, telegrams relating to the private affairs of the owner; and, secondly, telegrams relating to other people's affairs, sent as an exceptional favour and not charged for; but this is certainly not said. The second exception provides not only for nearly every case provided for by the first exception, but also for the case which seems to have been, for some reason, omitted from the first exception, namely, telegrams relating to the affairs of the owners' friends sent gratuitously; for the telegrams to which the second exception refers may relate to any subject so long as they are not charged for, and so long as the telegraph by which they are sent is maintained for the private use of any corporation, company, or person.

Probably some amendment made while the Act was passing through parliament was the cause of this confusion, but, however this may have been, the effect of the two exceptions seems to us to be that if a person, company, or corporation has a telegraph maintained bonâ fide for his or its own use—if, for instance, a banker has a telegraph to communicate between his office in the city and another office in a distant part of London, or if under the Act of 1868 (s. 9, sub-s. 8) a railway has made arrangements with a coal master upon the company's system for a private telegraph between his coal pit and a station, they may not only send telegrams on their own affairs, but may also, under special circumstances, and if no charge is made, send messages on the affairs of others. This

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view of the exceptions shews how wide the exclusive privilege granted to the Postmaster-General was intended to be. But for them it would be unlawful for the owner of works spread over a great space of ground to have a telegraph to communicate between the different parts of the establishment, or for a man of business with two offices in different parts of London to have a telegraph between them. This supports what we have already said as to the difference between the exclusive privilege of the Postmaster-General in relation to telegrams and in relation to letters. The privilege relating to telegrams seems to us to be the wider of the two.

It was argued by the defendants that they were within the first exception, because in it the word "owner" ought to be read as including "owners," the effect of which was said to be that two persons might contribute to keep up a telegraph and use it for communicating with each other on affairs interesting to either, that each of them might again communicate with others, and that thus the country might in theory be covered with a network of telegraphic wires, each connecting two persons only. It was further suggested that if this were lawful, it would be lawful in order to avoid circuity and complication to consolidate the individual wires into a small number owned by a large number of subscribers, and this it was said was practically what was done by the defendant company. This ingenious argument appears to us to be unfounded, both in law and in fact. The exceptions seem to us to apply exclusively to telegraphs kept either by a single owner or under some express provision of the Telegraph Acts, like the one already referred to; but, quite apart from this, it is obvious that the telegraphs of the defendant company are neither owned nor maintained by the subscribers, nor are they used solely by the owners. The switch board and the trunk wires are the property of the defendant company, and they are essential to the system of communication adopted. Moreover, a charge in the shape of rent is made for the transmission of messages, and from this the company derives a profit. Each of these circumstances takes the case out of the exceptions, or rather prevents them from applying to it.

Lastly, it was asked by the defendants when and by whom the offence (if any) of the defendant company was committed. To

this we think the answer is, that if several persons combine to do an illegal act, each is guilty of the whole of it, so that when A. sends a telegram to B. by means provided by the company for that purpose, and under the provisions of a contract by which it is carried out, A., B. and the company are all guilty of an offence under s. 6 of the Act of 1869, namely, the offence of transmitting a telegram. Apart from this we think that when the company's servant puts A. in telephonic communication with B. the company aids and is concerned in transmitting a telegram, which, again, is an offence under the same section.

The result is, that we give judgment for the Crown, with costs. There will, accordingly, be declarations in the terms of paragraphs 1 and 2 of the prayer, an injunction in the terms of paragraph 3, and an order that an account be taken as in paragraph 4. (1)

Judgment for the Crown.

Solicitor for the Crown: *Horace Watson, Solicitor to the Post Office.*

Solicitors for defendants: *Waterhouse & Winterbotham.*

(1) The information prayed:—

1. A declaration that the wires and apparatus of the company are telegraphs within the meaning of the Telegraph Acts, and that messages or other communications transmitted by means of any such wires and apparatus as aforesaid are telegrams within the meaning of the same Acts.

2. A declaration that the transmission by or with the aid or permission of the company by means of any such wires and apparatus as aforesaid, of messages or other communications under or by virtue of contracts entered into upon the terms mentioned in the notices published and circulated by the company as aforesaid, or upon any terms under which any money or other consideration is or shall be paid or given, or promised to be paid or given, to the company, or of any other messages or other communications in respect of which or of the collection, receipt, transmission, or delivery of which any money or other consideration has been or shall be paid or given, or promised to be paid or given to the company, is an infringement of the exclusive privilege conferred on the Postmaster-General by the Telegraph Act, 1869.

3. That the company, their servants and agents may be restrained by the order and injunction of this Court from transmitting, and from aiding in or permitting the transmission within the United Kingdom, by means of any such wires or apparatus as aforesaid, of any message or other communication under or by virtue of any contracts or contract entered into upon the terms mentioned in the said notices, or upon any terms under which any money or other consideration is or shall be paid or given, or promised to be paid or given, to the company, or of any other message or other communication in respect of which or of the collection,

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BURGESS AND ANOTHER *v.* THE NORTHWICH LOCAL BOARD.

Highway—Houses abutting—Subsidence of Land—Raising of Road by Local Board—Raising of Houses by Owners—Compensation for Cost of—Liability of Local Board—38 & 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 144, 149, 179, 308.

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The plaintiffs were owners of houses abutting on a highway which was vested in the defendants, a local board acting under 38 & 39 Vict. c. 55 (Public Health Act, 1875), and having the powers and liabilities of surveyor of highways. The abstraction of salt from a bed beneath them caused from time to time a subsidence of the ground upon which the houses and highway were situate. The houses were rebuilt in 1870 on timber, so that they might be raised by screw-jacks. In 1876 the surface of the highway in front of the houses had subsided considerably, and the houses had subsided with it. The surface of the roadway remained continuous, so that traffic could pass along it as before; but the roadway was in a curved hollow, and at the level to which it had subsided was liable to be flooded, and in fact was flooded at times, so as to render traffic impossible. The defendants put materials on the roadway, so as to make the surface immediately above the point of the lowest subsidence about 4 feet 3 inches higher than it was at the commencement of the work. The plaintiffs, having had notice from the defendants, raised their houses simultaneously with the works to the roadway, and then claimed under s. 308 of the Act, and were awarded compensation for the cost of raising the houses.

Having regard to the obstruction to traffic caused by floods, the raising of the road was reasonably necessary to put it in a proper state for traffic; but, excluding the consideration of floods, the raising of the road to the extent described, though a reasonable and prudent act, was not necessary to put the road into a proper state for traffic:—

Held, that as the highway was vested in the defendants, no action of trespass

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receipt, transmission, or delivery of which any money or other consideration has been or shall be paid or given, or promised to be paid or given to the company, and from otherwise transmitting, or aiding in or permitting the transmission within the United Kingdom, of any message or other communication by means of any telegraph, for money or other consideration, and from in any other manner infringing the exclusive privileges conferred on the Postmaster-General by the Telegraph Act, 1869.

4. That an account may be taken of all moneys that have been paid to the company in respect of any messages or other communications transmitted or to be transmitted by means of any such wires and apparatus as aforesaid, by or with the aid or with the permission of the company, or in respect of the collection, receipt, transmission, or delivery of any such messages or other communications, and that the company may be ordered to pay into the exchequer, to the account of the Consolidated Fund, all moneys which, on the taking of such account, shall be found to have been paid to the company as aforesaid.

could have been maintained by the plaintiffs, even if more materials had been placed on the road than a surveyor of highways could justify, and that the plaintiffs had no right to have the road maintained at the level to which it accidentally and recently sank; and that the works of the defendants were not done "in exercise of any of the powers" of the Act within the terms of s. 308—which mean powers created by the Act, and not simply powers transferred by s. 144 from the surveyor to the local board—but were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have, and, consequently, that the plaintiffs were not entitled to compensation.

CASE stated pursuant to a master's order in an action brought upon an award made by a county court judge, pursuant to the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 180.

1. The plaintiffs were owners of houses and shops abutting on the High Street, Northwich, in the county of Chester.

2. The defendants were a local board acting under the Public Health Act, 1875, and other Acts incorporated therewith, and having (inter alia), in respect of a district within which the High Street is situate, the powers conferred by that Act on urban sanitary authorities, including those of surveyor of highways.

3. Northwich is situate above a bed of rock-salt. This salt is gradually eaten away by fresh water, and so forms brine. The brine flows under the town of Northwich at a depth which is estimated at from 100 to 200 feet. It is pumped up at several works in the neighbourhood of the town, where salt is manufactured. There is no pumping of the brine within half a mile of the town of Northwich. It was, however, to be taken as a fact for the purposes of this case that the pumping of the brine at some of the above-mentioned works, by abstracting the salt lying under the town of Northwich, causes from time to time a subsidence of the surface of the ground upon which the houses and street in par. 1 mentioned are situate. It was admitted for the purpose of this case that it was not in the power of the plaintiffs or the defendants to prevent the pumping of the brine or the consequent subsidence of the ground.

4. The plaintiffs' present houses were re-built in 1870 on the site of two houses which had become dilapidated owing to the subsidence of the ground caused as before mentioned. The street mentioned in par. 1 was at the same time repaired and restored to

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what was estimated to have been its former level. The plaintiffs' houses were rebuilt upon a plan to admit of their being raised from time to time, as occasion might require, by means of screw-jacks. The houses were made to rest on a foundation of timber bolted and tied together firmly, so that the whole fabric might be raised in one mass by powerful screws, at a comparately moderate expense, and so as to avoid the necessity of the houses having to be rebuilt in case it should become necessary to raise them. They were so raised in 1873, the ground and houses having subsided from the above-mentioned causes, and the road was at the same time repaired and restored.

5. By the month of October, 1876, the surface of the High Street at the part on which the houses of the plaintiffs abutted, for some distance on either side, together with the houses abutting on it, had again subsided considerably, and to a depth of five or six feet or thereabouts in the lowest spot. The street and houses on either side of that spot subsided in a gradual slope towards it, the houses leaning slightly on one side. The plaintiffs' houses and the shops, which were on the ground-floor of the houses, were at the same height above the surface of the roadway as they had been before the subsidence, and there were the same facilities for ingress and egress as before; but the whole was at a lower level, gradually declining towards the spot above mentioned where the subsidence was greatest. The surface of the roadway remained continuous, so that traffic could pass along it as before; but the roadway was in a curved hollow, and at the level to which it had subsided was liable to be flooded, and in fact was flooded at times so as to render traffic impossible. (1)

6. Salt has been manufactured from brine in the neighbourhood of Northwich in the manner described in par. 3 ever since the sixteenth century. In consequence of the working of salt, the land in the whole neighbourhood of Northwich has been sinking for at least 150 years now last past; and the piece of roadway mentioned in par. 5 of this case has from time to time during that period been a source of expense to the township, often requiring repairing and filling up, sometimes to the extent of

(1) This was said to have been for two or three days at a time, and to have occurred two or three times a year.

many feet at a time; and that has been absolutely necessary to keep it above water in time of flood. In the year 1858, the surveyor of the highway repaired and restored the street. In the years 1863, 1864, and 1871, it was also again repaired and restored by the then local board. On the occasion of the works in 1871, the houses now the plaintiffs' were rebuilt, as mentioned in par. 4. On each of these occasions the works done were similar to those hereinafter mentioned. No compensation has ever yet been paid in respect of such repairing and restoring.

7. In the months of October and November, 1876, the defendants did certain work to the roadway of the High Street, which the plaintiffs contended to have been a raising of the street within the meaning of s. 149 of the Public Health Act, 1875 (1), and an exercise by them of the powers conferred on them by that section, but which the defendants contended to have been a repairing and restoring of the roadway, and merely a fulfilment of their duty as surveyors of highways, under s. 144. (2)

8. Extracts from minute-books kept by the defendants shew the proceedings of the defendants in reference to the work, and the resolution in pursuance of which it was carried out:—[Certain resolutions for "raising" the streets were here set out.]

9. The works done were as follows:—Materials were put on the roadway so as to make the surface immediately above the point of

(1) 38 & 39 Vict. s. 149 enacts that: "The urban authority shall from time to time cause all such streets" (i.e., streets being or which at any time become highways repairable by the inhabitants at large within any urban district) "to be levelled, paved, metalled, flagged, channelled, altered, and repaired as occasion may require; they may from time to time cause the soil of any such street to be raised, lowered, or altered as they may think fit," &c.

(2) Sect. 144 enacts that "every urban authority shall within their district exclusively of any other person execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act: every urban authority shall also have, exercise, and be subject to all the powers, authorities, duties, and liabilities which by the Highway Act, 1835, or any Act amending the same,* are vested in and given to the inhabitants in vestry assembled of any parish within their district."

* 5 & 6 Wm. 4, c. 50; 4 & 5 Vict. c. 51; 8 & 9 Vict. c. 71; 25 & 26 Vict. c. 61; 27 & 28 Vict. c. 101; 28 & 29 Vict. c. 107.

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the lowest subsidence about 4 ft. 3 in. higher than it was at the time of the commencement of the work. The defendants, in determining the height at which they would leave the surface of the roadway, had not regard to the depth of the then last subsidence, but were guided by their view of what would best meet the requirements of the district and make the most efficient roadway.

10. The works were done without the consent of the owners of the houses abutting on the street.

11. The defendants upon beginning the works gave notice to the plaintiffs and the other owners of the houses adjoining that they were about to execute the works; and the plaintiffs then commenced to raise their houses, and they were raised simultaneously with the execution of the works to the roadway; and their houses were so raised by means of the mechanical contrivance described in par. 4 of the case. The execution of the works by the defendants necessitated the raising of the plaintiffs' houses.

12. After the works had been completed, the plaintiffs claimed from the defendants compensation for the damage which they alleged to have been done to them by the raising of the street; and they rested their claim to such compensation on the 308th section of the Public Health Act, 1875. (1) The defendants denied and still deny their liability to make the plaintiffs any compensation.

13. The plaintiffs nominated a county court judge to be arbitrator on their behalf, and they claimed to do so pursuant to ss. 179, 180, of the Public Health Act, 1875. (2) The defendants

(1) Sect. 308 enacts that, "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or, if the compensation claimed does not exceed the sum of 20*l.*, the same may at the option of either party be ascertained by and recovered before a court of summary jurisdiction."

(2) Sect. 179 enacts that, "in case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an

within fourteen days after such nomination denied that they were liable to make compensation, and disclaimed the jurisdiction of the arbitrator, and took no part in any proceedings had or done by him as arbitrator, on the ground that he had no jurisdiction. They declined to appoint or acquiesce in the appointment of an arbitrator: and, after the expiration of fourteen days after the nomination of the arbitrator, he sat and took evidence at the instance of the plaintiffs for the purpose of ascertaining whether damage had been done to the plaintiffs by the works done to the street, and the amount of such damage, if any. The plaintiffs claimed as such damage the amount of the expense they had incurred by raising their houses, as mentioned in par. 4 of the case, and gave evidence of such amount. The defendants did not attend, and took no part in the proceedings before the arbitrator.

14. The arbitrator by his award,—a copy of which was annexed to the case and was to be referred to,—awarded to the plaintiffs 130*l.* and the costs of the reference.

15. The plaintiffs' costs of the reference were subsequently taxed at 31*l.* 3*s.* 10*d.*

16. The plaintiffs duly demanded payment of these two sums of 130*l.* and 31*l.* 3*s.* 10*d.*, but the defendants refused to pay.

The question for the opinion of the Court was whether, upon the facts above stated, the plaintiffs were entitled to recover those sums or either of them.

After some argument heard on the 4th of March, the Court remitted the case to the barrister who stated it, with the question: "Was the raising of the road reasonably necessary to put it in a proper state for traffic, or in other words, could the road have been put permanently into a proper state for traffic as economically and

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arbitrator to whom the matter shall be referred."

Sect. 180 regulates the mode of conducting the arbitration; and sub-s. 4 provides that, "if for the space of fourteen days after any matter by this Act authorized or directed to be settled by arbitration has arisen, and notice in writing by one party who has duly appointed an arbitrator has been given to the other party, stating the matter to be referred, and accompanied by a copy of such appointment, the party to whom notice is given fails to appoint an arbitrator, the arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties."

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efficiently, without being raised to nearly its old level as by being so raised?" The barrister took evidence, heard counsel for the parties respectively and reported as follows: It was contended by the learned counsel for the plaintiffs that the true meaning of the above question was whether or not it was reasonably necessary for the defendants to execute the works referred to in the 9th paragraph of the special case, in discharge of a duty imposed upon them by law, so as to prevent the road remaining, at the time of the commencement of the said works, or becoming within a period which could then reasonably be foreseen, in a condition which would render the parish liable to an indictment for non-repair. This construction of the question was not assented to by the learned counsel for the defendants.

Under these circumstances the barrister stated the following findings of fact.

Before and at the commencement of the works in the 9th paragraph of the case mentioned the road was sinking gradually. The sinking was progressing most rapidly at or near the same spot, so that the lowest part of the depression already existing would have gradually deepened, and the inclination of the roadway on each side would have become steeper. The deepest part of the depression which was near a sharp curve in the street was already, before the commencement of the works, mentioned in the case, a source of inconvenience to the traffic at times, other than times of flood, which inconvenience would have increased as the depression deepened. Moreover, the gradual deepening of the hollow rendered the roadway more and more liable to be flooded in times of excessive rains, causing during the continuance of the flood serious inconvenience to, and occasionally the complete obstruction of, the ordinary traffic. If the road had been raised to a less height than that mentioned in the 9th paragraph of the case, having regard to the continuing depression abovementioned, the road would have required to have been raised again after the lapse of a shorter time than will be required under the existing circumstances, and thus a greater expense would have been incurred.

As the result of the facts above stated, and assuming the construction put by the learned counsel for the plaintiffs upon the

above-mentioned question to be correct, I find that having regard to the obstruction to traffic caused by the floodings of the road during their continuance, the raising of the road was reasonably necessary to put it in a proper state for traffic, and that the road could not have been put permanently into a proper state for traffic as economically or as efficiently without having been raised to the extent and in the manner described in the special case.

On the other hand, on the above-mentioned assumptions, if the consideration of the liability of the road to occasional flooding be excluded, and having regard only to the inconvenience caused to the ordinary traffic in times other than times of flood by the continuing depression above-mentioned, I find that though the raising of the road to the extent, and in the manner described in the special case was a reasonable and prudent act on the part of the defendants, yet that such raising was not necessary to put the road in a proper state for traffic.

1880. Dec. 11 and 18. *Channell*, for the plaintiffs. Although the defendants declined to appear before him at the original hearing of the case, the arbitrator had jurisdiction: *Burgess* v. *Northwich Local Board* (1), see also *Nutter* v. *Accrington Local Board of Health*. (2) The award is conclusive as to the facts and amount of damages. The main question is whether the defendants' operations on the street were in pursuance of a duty or exercise of their powers. The finding of the arbitrator is, in substance, that more than was necessary had been done, but that it was good and proper. Therefore it was an improvement, done in exercise of their powers conferred by the Act, and the finding is in favour of the plaintiffs. A right of road is in the nature of an easement. If liable to be flooded the road is less convenient. But the public take it as it is. Apart from statutory powers the defendants have no right to interfere with the surface of the land, unless merely to metal it. They may not raise it. A road lying near a river and therefore liable to be flooded could not be raised without statutory powers, still less could the parish be indicted for not raising it. There is no authority whatever for indicting a parish in respect of a road being impassable by reason of water, unless of course the water

(1) 37 L. T. (N.S.) 355. (2) 4 Q. B. D. 375.

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was a consequence of neglect to cleanse ditches or some such omission of duty. But the defendants would, before the Act, have been indictable for raising the road, or even if they interfered with a mere privilege right: *Beckett* v. *Midland Ry. Co.* (1) In *Metropolitan Board of Works* v. *McCarthy* (2) no part of the plaintiff's land was taken, but his access to the highway the river Thames was affected, and he recovered compensation.

M'Intyre, Q.C. (*Horace Brown,* with him), for the defendants. There is no liability on the defendants. The plaintiffs had a right to have the road kept as near to the level as it could be with relation to the house as constructed, viz., so that it might be raised from time to time. The defendants were under the Public Health Act, 1875, s. 149, bound to cause the street to be "repaired as occasion may require." To "repair" means to restore the road, and not merely to render it capable of being temporarily used. For instance, suppose the arch of a viaduct fell it must be replaced, or suppose the highway was over an embankment on the shore and the sea made a mere gap. The duty of the defendants would be to make the road as nearly as possible what it was before, and not merely to render traffic along the road possible: *Reg.* v. *Inhabitants of Greenhow.* (3) Here there was certainly no destruction of the high road exempting the surveyor from liability to repair. This being an ancient road repairable by the inhabitants of the township, they were bound to keep it as nearly as possible in the condition best for the traffic of the district. The defendants, as surveyor, are under that obligation. Sect. 149 provides that the authority may from time to time cause the soil of the street to be "raised, lowered, or altered." That means that they may do so to a street in a fixed or proper position. The case finds in effect only that they have "restored" the sunken street.

[LOPES, J. The arbitrator finds that though a reasonable and prudent act, yet that such raising was not necessary to put the road in a proper state for traffic.]

But also that it "could not have been put permanently into a proper state for traffic economically or efficiently" without having been so raised, and that the depression "would have gradually

(1) Law Rep. 3 C. P. 82. (2) Law Rep. 7 H. L. 243.
(3) 1 Q. B. D. 703.

deepened." The defendants have not "raised or altered" the road within the meaning of the Act. If they have, then even filling up a rut in the road would be "raising" that part of it. Of course, in one sense repair is improvement, but these repairs were not improvements giving ground for compensation.

The distinction between the different acts is shewn by illustrations in a frontispiece to Bateman on Highways. If a road is raised, or lowered to, or altered from the proper or normal level, then the compensation clauses apply. The plaintiffs have built beside a sinking road which they must have known would be eventually raised. The duty of the surveyor was to restore it as nearly as possible, and the defendants have done no more. No doubt, if access to a road had been injured, as in *Metropolitan Board of Works v. M'Carthy* (1), compensation might have been recoverable. But here the whole damage claimed is the cost of working up the house to the level. That is not actionable damage, and the award giving compensation for it cannot be maintained.

Channell replied. "Raising" does not mean raising with reference to the centre of the earth, but relative raising with reference to the adjacent surface.

No authority can be found on the question of floods on the highway. In *Reg.* v. *Inhabitants of the Parish of Paul* (2), Maule, J., held that a parish could not be convicted for not rebuilding a sea-wall over which a road ran that had been washed away by the sea; and so in *Reg.* v. *Inhabitants of Greenhow* (3) said Blackburn, J.

The ordinary right of road is a right to go over the land as it is; if a man's land falls the public still pass over it but in its fallen state. The road has been raised under the powers of the Act, and compensation should be paid for the damage to the plaintiffs' rights; "it would be the height of absurdity to say that a private right is not interfered with, where a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway," per Lord Cairns, C., in *Lyon* v. *Fishmonger's Co.* (4)

Cur. adv. vult.

(1) Law Rep. 7 H. L. 243.
(2) 2 Mo. & R. 307.
(3) 1 Q. B. D. 703, at pp. 707–8.
(4) 1 App. Cas. 662, at pp. 675–6.

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Dec. 21, 1880. LINDLEY, J., after stating the facts from the special case and the supplemental statement:—In order that the plaintiffs may succeed in this action, they must shew, 1. That they had some rights which the defendants have infringed; 2. That they have sustained damage by reason of the exercise by the defendants of some of the powers conferred upon them by the Public Health Act, 1875, 38 & 39 Vict. c. 55.

It is necessary for them to shew that they had some right which the defendants have infringed; for, it is now a well-settled principle that a person is not entitled to compensation for damage done to him by a public authority acting under the powers of an Act of Parliament, unless he could have maintained an action for such damage if the statute had not authorized the acts causing the damage: *Ricket* v. *Metropolitan Ry. Co.* (1) I proceed, therefore, to inquire what rights the plaintiffs had in respect of their houses and the road in question.

The plaintiffs do not allege that they had any prescriptive rights, e.g. to light, which have been infringed by the defendants.

They do not allege that before the passing of the Public Health Act, 1875, they were the owners of the soil over which the road runs. But, as primâ facie, such soil or some part of it would belong to them as adjoining owners, and as at common law the owner of land over which a highway runs, may maintain trespass for anything unlawfully put on such highway (see *Lade* v. *Shepherd* (2), and *St. Mary, Newington* v. *Jacobs* (3)), it may be as well to shew that they cannot maintain this action in the character of owners of the road.

By s. 149 of the Public Health Act, 1875, 38 & 39 Vict. c. 55, the highway in question was vested in the local board, and vested in them so as to confer upon them the property in, and possession of the surface of the soil even as against the former owner thereof: see *Coverdale* v. *Charlton* (4), and *Rolls* v. *Southwark Vestry* (5), where the effect of the above section, and the sense in which the soil is vested in the local board are discussed and determined. It follows that the owner of the land adjoining

(1) Law Rep. 2 H. L. 175.
(2) 2 Str. 1004.
(3) Law Rep. 7 Q. B. 47.
(4) 4 Q. B. D. 104.
(5) 14 Ch. D. 785.

the highway cannot, as owner of the soil of the highway itself, maintain an action against the local board for putting materials on the highway in excess of what might be required for merely rendering it fit for traffic. In other words, if the old forms of action were still in use, the plaintiffs, even if owners of the soil under the highway, could not maintain an action of trespass against the local board for putting on their land more materials than a surveyor of highways could justify. The local board are the owners of the surface; and, even if they have overloaded the surface, no injury has been done to the plaintiffs by such overloading. Moreover, the plaintiffs' inability to maintain such an action is the consequence of s. 149, which changes the ownership of the soil. It is not the consequence of any exercise of any of the powers conferred on the local board; and the plaintiffs cannot claim compensation on the footing of any trespass to their property; nor do they in truth put forward this claim on that ground.

The plaintiffs rely, and are driven to rely on the injury done to their houses by raising the road in front of them. But, in order to establish any right of action or to compensation for this injury, they must shew that they are entitled to have the road kept at the level at which it was after it subsided. No right short of this will avail them. The right alleged to have been infringed is the plaintiffs' right to pass and repass from their houses to the road, and from the road to their houses. The right of a person who has a house or land abutting on a highway, to pass and re-pass from one to the other is incontrovertible, and must be conceded to the plaintiffs: *Lyon* v. *Fishmongers' Company* (1); but where, as in this case, he is not the owner of the soil of the highway, his right so to pass and re-pass is a consequence of the dedication of the highway to the public; and, if the plaintiffs could shew that the highway had been dedicated to the public at the level at which it accidently sank, they would have had a right of access at that level, and a right of action if such level was altered to their detriment.

The plaintiffs' right of access to the road when it was sunk is not open to controversy; but I can find neither principle nor

(1) 1 App. Cas. 662.

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authority for saying that they had a right to have the road which had recently accidentally sunk maintained at the level to which it had so sunk. Unless, however, they had such a right, they are not in a position to maintain that any right of theirs was infringed, if the road is raised to the height at which it was before it subsided. Even, therefore, if the defendants in this case have done more than was necessary or proper for repairing the road and keeping it in repair, I am of opinion that the plaintiffs have failed to establish any infringement by them of any right of theirs. In other words, the plaintiffs had no cause of action and no right to compensation.

I proceed next to inquire into the question whether the defendants raised the road under the powers conferred upon them by the Public Health Act, 1875, or whether they did so under the powers which all highway surveyors as such can exercise.

In one sense, everything the defendants did was in exercise of the powers conferred upon them by the Public Health Act; but, by the expression "exercise of any of the powers of this Act," in s. 308, I understand new powers created by the Act, viz., by s. 149, and not powers simply transferred by s. 144 of the Act from the highway surveyor to the local board.

The duty of the highway surveyors is to repair and keep in repair (5 & 6 Wm. 4, c. 50, s. 6); which means, I apprehend, to keep the road as dedicated to the public in such a state as to be safe and fit for ordinary traffic. An occasional flooding, even if it temporarily renders a highway impassable, is not sufficient to sustain an indictment for non-repair: and it may be, and I think is, true that if the road had not been raised it might nevertheless have been made safe and fit for traffic, so as to have rendered an indictment unsustainable. But, considering that the road had only recently sunk, and that what was done was, in substance, to restore it to the state in which it was before it sank, I am of opinion that what the defendants did was not in exercise of any of the powers conferred upon them by the Public Health Act, but was done by them, if not strictly in performance of their duty as surveyors of highways, at all events in exercise of such powers as highway surveyors have.

The defendants, it is true, raised the level of the road as it

existed after the accident; but they did not raise the road higher than it was before the accident, nor higher than it was when dedicated to the public or when vested in the defendants. If, indeed, the old road had been at the level to which this road sank, and had been raised from that level, the plaintiffs would, in my opinion, have been entitled to compensation; for in that case their right of access would have been infringed, and the defendants could only have justified their acts by reason of their exercise of powers created by and conferred upon them by the statute. But, under the peculiar circumstances of this case, I am of opinion that the plaintiffs are entitled to no compensation,—first, because no right of theirs has been infringed; and, secondly, because the defendants have acted under powers transferred to them as surveyors, and not under powers created by the statute. In my opinion, therefore, judgment should be entered for the defendants.

LOPES, J. The question is whether the defendants, the Northwich Local Board, in the cases stated in this special case, have exercised a power conferred upon them by the Public Health Act, 1875, and thereby caused damage to the plaintiffs, or whether they have merely performed a duty as "surveyor of highways."

The plaintiffs, to maintain this action upon the award, and to recover compensation from the defendants, must establish that the defendants have done an act for which they, the plaintiffs, might have brought an action unless the legislature had authorized it and substituted for an action a remedy by compensation.

It is essential to consider what, as found by the arbitrator, the defendants have done. They have restored the level of the road to about what it was in 1870; which raising the arbitrator finds, having regard to the obstruction to traffic caused by floods, was prudent and reasonably necessary to put the road into an efficient and permanent state for traffic, but, putting floods out of the question, and having regard only to the inconvenience caused to the ordinary traffic in times other than times of flood, was not necessary to the extent stated in the case. I believe this to be the result of what the arbitrator has found. Some raising, therefore, was absolutely necessary, independently of any floods, for the purposes of ordinary traffic: this it would be the duty of the

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claimed by the Duke of Norfolk as his freehold, and by the defendant, vicar of the parochial church of Arundel, as being the chancel or choir of the parish church; the plaintiff claimed an injunction to restrain the defendant from committing further trespasses. The cause was tried before Lord Coleridge, C.J., without a jury, in March, 1879; and after argument before his Lordship in May following, judgment was given for the plaintiff with 40*s.* damages. (1) The defendant appealed, and the Court of Appeal affirmed that judgment. (2)

Gainsford Bruce (*W. G. Phillimore*, with him), pursuant to notice, moved for a direction of the Court that the costs should be taxed upon the higher scale, under Order VI., rules 2 and 3, of the Rules as to Costs issued under s. 17 of the Judicature Act, 1875. (3) The 2nd rule provides that "solicitors shall be entitled to charge and be allowed the fees set forth in the column headed 'Higher Scale' in the schedule hereto,—in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents, and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'Lower Scale' are hereby made applicable." And rule 3 provides that, "notwithstanding these rules, the Court or judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs." These rules are not necessarily limited to cases where an

(1) See the report, 4 C. P. D. 290.

(2) See the report, 5 C. P. D. 390.

(3) *Jeune*, for the defendant, urged a preliminary objection, that the application should have been made to the master, under Order LIV., r. 2 (this not being one of the excepted cases), who might have referred the matter for the decision of a judge under r. 3, and that decision would be final. There was in fact here an application to Lord Coleridge at chambers, which was dismissed by him with costs. It is not competent to the plaintiff to appeal against that decision.

G. Bruce. A judge at chambers has no power to delegate to a master the discretionary power given to him by Order VI., r. 3: see *Corticene Floor Covering Co.* v. *Tull*, 27 W. R. 373.

DENMAN, J. Without deciding this preliminary point, I think it will be better to hear the argument.

injunction is the principal relief sought. In *Pooley* v. *Driver* (1) costs on the higher scale were allowed in an action brought upon a bill of exchange in the Chancery Division.

[LINDLEY, J. If the case is within rule 2, it would seem that it is for the master; if within rule 3, it is for the discretion of the judge, and there is no appeal.

DENMAN, J. The better way will be to treat this as an appeal from Lord Coleridge. The master will, of course, act upon his opinion.]

In *Harnett* v. *Vise* (2), Lord Justice James says: "The amount of damages given by the jury is not to be considered as conclusively establishing any remaining matter at issue. Every judge would take it as a material element in considering whether the jurisdiction given by Order LV. is to be exercised or not. But it is the duty of the judge who tried the case, and the duty of the Court of Appeal also, to consider the whole circumstances of the case, everything which led to the action," &c. So, here, the fact of the judgment being for nominal damages only will not deprive the plaintiff of his right to the benefit of this rule. The Court will look at all the circumstances out of which the action arose, and at the great interest which was at stake between the parties, and the amount of labour and expense required to establish the plaintiff's claim. That the Court has an independent jurisdiction in the matter, is clear from the case of *Myers* v. *Defries*. (3) If this question had been raised in the Chancery Division (as it would have been before the passing of the Judicature Acts), the plaintiff would clearly have been held entitled to have his costs taxed upon the higher scale. There is no reason why a different rule should prevail because the action is brought in this division: see the observations of Brett, L.J., in *Chapman* v. *Midland Ry. Co.* (4) If there ever was a case in which costs on the higher scale ought to be allowed, this is that case. The plaintiff claims an injunction to restrain the defendant from interfering with his property. That claim is resisted on three grounds,—first, that the building in question was part of the parish church,—secondly, on the ground of a prescriptive right to light and air,—thirdly,

(1) 5 Ch. D. 459, 494.
(2) 5 Ex. D. 307, 311.
(3) 4 Ex. D. 176.
(4) 5 Q. B. D. 435.

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on the ground that the structure was consecrated ground, and therefore no alteration could be made in it without a faculty. All these objections were overruled: and the Lord Chief Justice might have granted an injunction to restrain the defendant from further interfering with the plaintiff's rights.

Jeune, contrà. The action was substantially for damages for an alleged trespass. The question was, to whom did the land belong? That was an action which before the passing of the Judicature Acts was usually tried in the courts of common law,—like claims to the foreshore: see *Calmady* v. *Rowe*. (1) The intention of the Judicature Acts was not to give higher costs in the Common Law Courts than were allowed before: see s. 34 of the Act of 1873. "One test," says Brett, L.J., in *Chapman* v. *Midland Ry. Co.* (2), "is,—unless it is met by other considerations in the particular case,—whether the party has selected the Common Law Division or the Chancery Division to bring his action. If a person, in such a case as the present (3), really required, as the principal relief which he seeks, an injunction, I should have thought that the natural course for him would be to apply to the Chancery Division: but, if the party seeks to recover damages, then it would seem more natural that he should institute proceedings in the Common Law Division." And Lord Justice Thesiger bases his judgment upon the intention of the Judicature Acts and of the Rules and Orders framed under them, to give the old scale of Chancery costs in cases peculiar to the Chancery Division, and the lower or ordinary scale in cases which are naturally brought in the Common Law Division of the High Court.

[DENMAN, J. The mere fact of the plaintiff selecting one or other division to bring his action in cannot be the true test. If *Pooley* v. *Driver* (4) had been tried in a Common Law Division, why should not the plaintiff have come to the Court and asked them to give him costs upon the higher scale, as the Master of the Rolls did there?]

Phillimore was heard in reply.

(1) 6 C. B. 861.
(2) 5 Q. B. D. 431, 435.
(3) Trespass to land.
(4) 5 Ch. D. 459.

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DENMAN, J. After the course the argument has taken, it must be understood that the judgment I am about to give is wholly confined to the state of things which may be described as a case upon original application under rule 3 of Order VI. of the orders relating to costs. If this were a case in which we were now proceeding under rule 2, totally different considerations would apply: but I think the plaintiff had a right to come here notwithstanding what took place before Lord Coleridge, and ask the Court to make an order for costs upon the higher scale, under rule 3. We have had the advantage of consulting Lord Coleridge as to what had taken place before him; and he tells us that the application was one which he considered solely under rule 2 of Order VI. Now, with regard to rule 3, I do not by any means intend to hold, nor do I think we ought to hold, that there may not be cases in which, though an action is brought in the Common Law Divisions, and though, before the Judicature Acts and before these rules were passed, an action of trespass or an action of ejectment would have been the sole nature of the case, the Court might for due considerations order the costs to be taxed upon the higher scale under rule 3 of Order VI. We have had our attention directed to a case in the Chancery Division, of *Pooley* v. *Driver* (1), in which the Master of the Rolls laid down in substance, though not in so many words, that the question of whether the action is brought in one division or the other is not a conclusive test; and we also have dicta of Lord Justice Brett and Lord Justice Thesiger in the case of *Chaplin* v. *Midland Ry. Co.* (2), which are much to the same effect, though they are applied to the other rule of the Order, rule 2, and not to rule 3. Still I think they are dicta which go to shew that, though the Court in which the action is brought is a test, still it is by no means a conclusive test, upon the question of whether the costs ought to be allowed upon the higher scale or not: and I can conceive cases in which, where the action is one of an old-fashioned character, viz. an action of trespass, in which the judge at the trial would have certified that it was brought to try a right, and in which the costs would have been the ordinary common law costs in the old time,—costs ought to be allowed upon the higher scale; still the question for us is,

(1) 5 Ch. D. 459. (2) 5 Q. B. D. 167, 431.

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whether in this particular case they ought to be so allowed. Now, upon that question I cannot but be considerably influenced by the view which the Lord Chief Justice, on consultation with us about it, and in giving us the benefit of his opinion, takes of the matter: and we have his authority for saying that, if that had been the question directly before him at chambers, he does not hesitate to say that under all the circumstances of the case, having heard it from beginning to end, having bestowed infinite pains about it, knowing that it went to the Court of Appeal, and being thoroughly conversant with the whole history and merits of the case, he does not think it is a case in which any special or sufficient grounds existed for allowing costs upon the higher scale, and he should not do so if it were for him to decide. Now, that, I think, is a matter which we are bound to take into account; it is a matter upon which the opinion of the judge who tried the case and who knows all about it is infinitely more valuable than any opinion that we who were not at the trial can form upon it; and upon that ground alone I should be disposed to decide this case.

But, though I by no means say that there may not be cases in which the costs ought to be allowed on the higher scale though they may be ordinary actions so far as the shape of them is concerned, I think upon the whole there is not a sufficient affirmative case for the allowance of such costs made out by Mr. Bruce and Dr. Phillimore on this occasion. There are arguments which have been used of more or less weight in that direction. The case was a long one; it raised an important question as between the parties; it was a case which necessarily required a good deal of research and much expenditure of money. Many such cases, however, have been and are almost daily tried; and it would, I think, require a stronger case than is made out here to warrant the Court in saying that, contrary to the opinion of the judge who tried the case, costs on the higher scale should be allowed. I think, therefore, there is not a sufficient affirmative case made out: and think so, although I should be sorry to lay down any rule which would make it impossible for persons who appeal to these courts for justice to obtain the same measure of justice and the same advantages which they could in the other Division of the High Court. Though, in short, I do not see why, the cases being identical, the same rule as

to costs should not apply in both divisions, I cannot say that a sufficiently strong case has been made out here for the allowance of costs upon the higher scale. I think the order prayed should be refused.

LINDLEY, J. I am of the same opinion. The language of rule 3 is such, I think, as to entitle the Court to consider this matter and to exercise its own discretion upon it where the point has not already been made the subject-matter of the discretion of the judge who tried the cause. At the same time, although that is so, when a question of this sort is raised before a Divisional Court, it is only natural that the judges who form it should consult the judge who tried the cause, and who must consequently know a great deal more about the matter than they possibly can,—not substituting his discretion for theirs, but taking his discretion as a guide to them in forming their own; and, having regard to the opinion of the Lord Chief Justice who decided this case, and who thinks that there is nothing to take it out of the ordinary rule, that does of course weigh very much with me in adopting that view and saying that in the exercise of my discretion I do not think a case for the allowance of costs upon the higher scale is made out.

The important matter, however,—more important than the particular point raised in this case,—is, whether this rule 3 applies to common-law actions at all, in which there is no equitable element; and it appears to me, I confess, that it is so worded that it does apply to all actions of all sorts and kinds. Its language is of the widest description. Its follows two other rules, one saying in what cases solicitors shall be entitled to charge and be allowed the fees set forth in the column headed "Lower Scale" in the schedule, and in what cases the fees set forth in the column headed "Higher Scale" shall be allowed. The 3rd rule is in these words,—"Notwithstanding these rules, the Court or judge may in any case direct the fees set forth in either of the said two columns to be allowed to all or either or any of the parties, and as to all or any part of the costs." It appears to me that under that rule it is competent to the judge who tries any action, or for the Court, in all proper cases, to say, as regards the costs of the action or any

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part of the costs, that they shall be taxed upon the lower or the higher scale, according to his or their discretion, having regard to the circumstances appearing before him or them.

I do not doubt that, in considering this question, such cases as have been mentioned, cases of common-law actions which *might* be brought in the Equity Courts, would primâ facie perhaps incline the judge to allow costs on the higher scale: but I for one, should not consider the rule limited in its application to cases of that kind. My impression is that the rule is so wide as to warrant the judge in the exercise of his discretion to order the taxation of costs in a pure common-law action, without any element of equity in it, on the higher scale; and I attach great importance to that principle being recognised, otherwise the practical consequence will be, to say the least of it, very disadvantageous. One recognised principle of taxation ought to prevail in every division of the High Court of Justice: the application of that general principle to each particular case must of course depend upon the discretion of the judge.

I will say no more about this particular case except this, that it really seems when one comes to look at it to be a case which does not involve any equitable element in the shape of equitable principles at all. It is a mere question of title. The Duke of Norfolk claimed title to a building known for centuries as the Fitzalan Chapel; and the defendant insisted that it was part of the parochial church of Arundel,—a purely legal question. The Duke has succeeded; and he is entitled to such costs as naturally and legally follow that success. He asks for something more. The Lord Chief Justice who tried the case does not see why he should have more; neither do we. The motion must be dismissed with costs.

Motion dismissed, with costs.

Solicitors for plaintiff: *Few & Co.*

Solicitors for defendant: *Brooks, Jenkins, & Co.*

EDWARDS *v.* THE MIDLAND RAILWAY COMPANY.

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Dec. 15.
Q. B. D.

Corporation—Action against—Malicious Prosecution.

An action for a malicious prosecution will lie against a company.
Stevens v. *Midland Ry. Co.* (10 Ex. 352) not followed.
The employment of policemen by a company to protect their property is an act within the scope of the incorporation of the company.

11 QBD 446

FURTHER consideration before Fry, J.

The cause was tried at the last summer assizes at Stafford, when it appeared that the plaintiff sued the company for malicious prosecution. He had been arrested by a detective policeman in the employment of the company on a charge of theft, and the charge had been dismissed by the magistrate.

The jury gave the plaintiff damages for the malicious prosecution, and two questions of law were reserved: 1. Whether an action for malicious prosecution will lie against a corporation. 2. Whether the employment of the police was an act within the scope of the company's incorporation.

Staveley Hill, Q.C., and *A. T. Lawrence*, for the plaintiff. Such an action lies against a corporation: *Eastern Counties Ry. Co.* v. *Broom* (1); *Goff* v. *Great Northern Ry. Co.* (2); *Yarborough* v. *Governor and Company of Bank of England.* (3) The acts of the police were the acts of the company: *Green* v. *London General Omnibus Co.* (4) It is not necessary to shew actual malice: *Whitfield* v. *South Eastern Ry. Co.* (5)

Powell, Q.C., and *Evans*, for the company. There can be no such action against a company: *Stevens* v. *Midland Counties Ry. Co.* (6) A corporation was held not to be a person in *Pharmaceutical Society* v. *London and Provincial Supply Association.* (7) There was no malice here: *Bank of British North America* v. *Strong.* (8) The employment of the police is not within the

(1) 6 Ex. 314.
(2) 30 L. J. (Q.B.) 148. 7 Jur N S 286
(3) 16 East, 6.
(4) 7 C. B. (N.S.) 290.
(5) E. B. & E. 115. 4 Jur N S 688
(6) 10 Ex. 352. 16 Jur 932
(7) 5 App. Cas. 857.
(8) 1 App. Cas. 307.

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scope of the authority of the company's officers: *Bank of New South Wales* v. *Owston*. (1)

FRY, J. I am asked to decide this question, as it were, by way of rehearsal, as it is intended to carry it to a higher tribunal. I must therefore express my opinion on it. The question is whether a railway company can be made liable in an action for malicious prosecution. The malice, in order to found such an action, need not be express malice, but it may be implied from the wrongful action without just cause or excuse. Now, it is a maxim that a corporation has no mind, no mens rea, therefore they cannot be guilty of malice; can they therefore escape the consequences of an action which in the case of an ordinary person would be held to imply malice? Mr. Hill suggests to me the case of partners who would be individually liable for an action maliciously instituted by the partnership, and the subsequent incorporation of the partnership into a company; can it be said that the company, consisting of the same persons as before, is not to be made liable for the same wrongful action? It would be strange if it were so, though I must not forget that the individuals who directed such a wrongful action on the part of the company would be personally liable.

Those who deny that the company can be made liable rely principally on Baron Alderson's judgment in *Stevens* v. *Midland Counties Ry. Co.* (2), where he held that in order to support such an action it must be shewn that the defendant was actuated by a motive in his mind, and that a corporation has no mind. The two other judges, Barons Platt and Martin, did not agree with Baron Alderson's reasons, but decided in the company's favour on other grounds.

Has Baron Alderson's opinion, which in that case stands alone, been followed by other judges? In *Rex* v. *City of London*, which is cited in a note to *Whitfield* v. *South Eastern Ry. Co.* (3), it was held on demurrer that an action would lie against the Corporation of the City of London for maliciously publishing a libel, and though that decision is not of the greatest weight, being

(1) 4 App. Cas. 271.

(2) 10 Ex. 352.

(3) E. B. & E. 122.

affected no doubt by political as well as legal considerations, still it was assented to by Chief Justice Saunders, an able and experienced judge. In *Yarborough* v. *Bank of England* (1), Lord Ellenborough referred to an earlier case of *Argent* v. *Dean and Chapter of St. Paul's* (2), and said that the instances of actions against corporations for false returns to writs of mandamus must be numberless. Again, in *Whitfield* v. *South Eastern Ry. Co.* (3), Lord Campbell says that "the ground on which it is contended that an action for a libel cannot possibly be maintained against a corporation aggregate fails," and "considering that an action of tort and trespass will lie against a corporation aggregate, and that an indictment may be preferred against a corporation aggregate both for commission and omission, to be followed up by fine, though not by imprisonment, there may be great difficulty in saying that, under certain circumstances, express malice may not be imputed to and proved against a corporation." In *Green* v. *London General Omnibus Co.* (4) it was held that a corporation aggregate may be liable to an action for intentional acts of misfeasance by its servants, provided they are sufficiently connected with the scope and object of its incorporation. There Chief Justice Erle says: "The ground of the demurrer is, that the declaration charges a wilful and intentional wrong, and that the defendants being a corporation, cannot be guilty of such a wrong, and therefore the action will not lie." In the case before me it is similarly argued that a corporation cannot act maliciously or intentionally, because malice and intention imply mind. Chief Justice Erle continues: "The doctrine relied on that a corporation having no soul cannot be actuated by a malicious intention, is more quaint than substantial." In other words, the ratio decidendi of Baron Alderson was in this case disregarded, and as his decision has not been followed in English Courts, I am at liberty to decide in conformity with the later decisions, and I hold, therefore, that the action will lie in this case.

The next question is, was this act done within the scope of the incorporation of the company? I hold that it was; the company may restrain the commission of crime on their railways; and the

(1) 16 East, 6.
(2) 16 East, 7, note (a).
(3) E. B. & E. 121.
(4) 7 C. B. (N.S.) 290, at p. 301.

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observations made in *Goff* v. *Great Northern Ry. Co.* (1) shew that a company so acting may be responsible for an illegal arrest. I give judgment, therefore, for the plaintiff, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *J. C. Selby, for Stroud, Cheltenham.*
Solicitors for defendants: *Beale, Marigold, Beale, & Groves.*

Dec. 15.

Ex. D.

MATTHEWS *v.* JEFFREY.

Burial Acts (15 *&* 16 *Vict. c.* 85; 16 *&* 17 *Vict. c.* 134)—*Burial Board—Grave—Grant in Perpetuity—Family Rights—Executor—Purchase of Grave.*

A burial board may, under the Burial Acts (15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134), grant a grave space to the grantee and his heirs, and the title to the burial rights under such grant will descend to the heirs of the grantee, and will not be vested in all members of the family of the grantee.

FURTHER consideration before Fry, J.

The cause was tried at the last summer assizes for Stafford, when it appeared that the plaintiff claimed the right to certain "grave spaces" in Hanley Cemetery, and damages for trespass, and an injunction to restrain future burials by the defendant in the said grave spaces. The plaintiff and the wife of the defendant were brother and sister. Their mother, Eliza Matthews, had purchased from the corporation of Hanley two "grave spaces" in the cemetery, which were conveyed by an instrument given under the seal of the borough, dated the 22nd of July, 1873, whereby "by virtue of the powers conferred on burial boards constituted under the several Acts of Parliament relating to burials (2) now in force in England, or some or one of them, to grant exclusive right of

(1) 30 L. J. (Q.B.) 152, 7 Jur. N.S. 286

(2) The statute 15 & 16 Vict. c. 85 (which was made applicable to parishes elsewhere than in the metropolis by 16 & 17 Vict. c. 134) provides (sect. 33) that "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial ground provided by such board, and also the right of constructing any vault or place of burial, with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing

burial," the mayor, aldermen, and burgesses of the borough of Hanley, in the county of Stafford, acting by the town council of the said borough as the burial board of Hanley aforesaid, in consideration of the sum of 20*l.* granted the grave spaces in question "to Eliza Matthews, her heirs and assigns for ever, for the purpose of burial, subject to the payment of fees payable under the Burial Acts and regulations for the time being in force."

The jury found that the purchase of the grave spaces was made out of the estate of Edward Matthews, father of the plaintiff and of the wife of the defendant, who were beneficially interested in his estate by virtue of his will.

Mrs. Matthews caused her husband, Edward Matthews, to be buried in the grave spaces in 1874, and she was herself buried there in the same year. She died intestate. The plaintiff was her heir-at-law and also her administrator, and he claimed to be entitled to the control of the grave spaces. The defendant had, with the consent of the burial board, interred his infant child in one of the burial spaces, and this action was brought by the plaintiff, who claimed to have possession of the said grave spaces, for an injunction to restrain the defendant from continuing to retain possession of the said spaces, and from continuing to keep his said child buried there, and from continuing to interfere with the plaintiff's said rights.

The defendant, on the other hand, contended that by analogy to faculties for sittings and pews, the grant enured to the benefit of all the members of Mrs. Matthews' family, and that any member who resided in the parish, when he died, could be buried in the grave spaces. If he was not entitled to bury his child in this ground, he contended further that the purchase-money was part of

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any monument, grave stone, tablet, or monumental inscription in such burial ground, but there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any rights acquired under this enactment in the consecrated part of such burial ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial ground of his parish) such fees or sums as shall be settled and fixed by the vestry, with the approval of the bishop of the diocese, and if no such fees or sums shall have been so settled, then such fees as he would by law or custom have been entitled to on the grant of the like rights in the burial ground of his parish."

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the estate of Mr. Matthews, the father of the plaintiff, under whose will Mrs. Jeffrey was entitled to an equal share of her father's estate, and was therefore entitled to the use of that property.

Jelf, Q.C., and *H. D. Greene*, for the plaintiff, relied on the terms of the grant to Eliza Matthews, her heirs and assigns. The plaintiff, as heir-at-law, is the only person who has any authority over or title to the grave spaces.

Anstie, and *Tyssen* (*H. Matthews, Q.C.*, with them), for the defendant. This grant is made under 16 & 17 Vict. c. 134, which extended to other places (s. 7) certain provisions of the Metropolitan Act (15 & 16 Vict. c. 85). The purpose of both Acts was to provide new burial grounds to take the place of the old churchyards. This intention is clear, and especially from ss. 32, 33 of 15 & 16 Vict. c. 85, under the latter of which sections the grant was made. The nature of the "exclusive right of burial in perpetuity," which that section allows to be granted is not expressly defined, as it was in the earlier Metropolitan Act (13 & 14 Vict. c. 52). That Act, by s. 62, incorporated 10 & 11 Vict. c. 65, which by s. 44 made such rights personal estate; but it was itself repealed by 15 & 16 Vict. c. 134, which did not re-enact these clauses; and the nature of the rights created under s. 33 must be determined by reference to the analogous rights which existed in the churchyards which the burial grounds were intended to supersede. The grant actually made must be construed accordingly; it cannot give the right either to the "heirs" or to the personal representatives of the grantee; and, to the extent to which it is operative, must be read as equivalent to a faculty for exclusive burial in perpetuity. The proper form of faculty in such a case is to the grantee and his or her "family," resident in the parish, as shewn in *Magnay* v. *Rector of St. Michael* (1), quoted with approval by Sir R. Phillimore: Phil. Eccl. Law, i. 884. Any of the family so resident have a right to be buried in this ground, subject to the approval of the burial board, as formerly subject to the approval of the rector or vicar: *Bryan* v. *Whistler*. (2)

Further, it appears that the grave spaces were purchased by Mrs. Matthews as executrix of Mr. Matthews, and out of his

(1) 1 Hagg. Eccl. Cas. 48.

(2) 8 B. & C. 288.

personal estate. If therefore the plaintiff can make out any title either as her heir or her administratrix, he holds the property in trust for those beneficially entitled under his will, of whom the defendant's wife is one.

FRY, J., after stating the facts, said:—

Under the grant made to Eliza Matthews, her heirs and assigns, the plaintiff has a primâ facie title to these spaces; the power to make that grant is derived from the 33rd section of the Act 15 & 16 Vict. c. 85, which provides for the sale in perpetuity of rights of burial.

The defendant denies the primâ facie right claimed by the plaintiff on two grounds. He asserts that the grant is not within the intention of the statute under which it is made, and says that the right of burial must either descend by analogy to rights known to the ecclesiastical law, or that in this case it belongs to him or his wife according to the equitable rules relating to trusts.

In the first place he says that the right of burial by ecclesiastical law would descend to every member of the family of Eliza Matthews residing in the parish, but the only argument in support of this contention is that in one case which was cited a grant was made to "a family" in this form. It does not seem to be clear whether any member of the family might be buried under such a grant without the consent of the personal representative of the person to whom the grant was made, so that even if the common form of grant is to "a family" (which perhaps it is), it is not shewn who is to regulate the right of burial: no doubt the rector has the control in parochial churchyards, and in this case the burial board would stand in the rector's place, but as regards the right of using the burial spaces, it would seem far better to have it vested in one person than that there should be a roving right for any member of a family to bury any other member of the family in them. Faculties with respect to pews, to which an analogy has been suggested, have a different object, namely, to exclude the rights of others than the grantee. Another analogy is suggested from the laws relating to cemeteries where the grant of a right to bury has been held a personal right. The sections from the Cemetery Acts which were incorporated in the earlier

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Burial Acts are, as it has been pointed out, omitted from the Acts applicable here, but whether they would apply or not, in the absence of a special grant to heirs, it is not necessary for me to decide. The form of the grant has, in my opinion, decided who has the right in perpetuity in this case, and the plaintiff as heir-at-law has a title which excludes any personal right.

Then it is said that the jury found that the money for the purchase was part of the personal estate of Edward Matthews, and therefore it is argued that all persons interested in that estate may claim a right to burial on the analogy of equitable rules as to trusts; but, first, I do not find that the defendant was a member of Edward Matthews' family, though his wife was, and his right through her should have been pleaded if it was to be set up; and secondly, it is doubtful if his wife could sustain a claim by reason of the expenditure of her father's property on the grave, for an executor must not spend more on a grave than is required for the burial of the deceased person. It would be a wrongful conversion, and before the right so purchased can be substituted as part of the trust estate all persons who are entitled to the assets must elect to take it in substitution, and no such election is shewn here. Therefore the plaintiff as heir-at-law is entitled to judgment, but I grant an injunction only as to all future interference, and as regards the burial of the defendant's child, if I am to give any relief, I give damages under Lord Cairns' Act to the amount of one shilling.

Judgment accordingly.

Solicitors for plaintiff: *Learoyd, Learoyd, & Peace, for A. Challinor, Hanley.*

Solicitors for defendant: *Llewellyn, Ackrill, & Hammack, for Llewellyn & Ackrill, Tunstall.*

[IN THE COURT OF APPEAL.]

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Dec. 21.

THE CREDIT COMPANY *v.* POTT.

(C. A.)
Ex. D.

Bill of Sale—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Statement of Consideration.*

A. being indebted to B., gave him a bill of sale to secure the sum of 7350*l.*, which, on stating the accounts between them, was found to be the balance due, and by such bill of sale this sum was to be paid by A. with interest on demand in writing. The bill of sale recited that B. had agreed to lend A. 7350*l.*, and the consideration for such bill of sale was stated therein to be 7350*l.* then paid by B. to A.:—

Held, that the bill of sale truly set forth the consideration for which it was given so as to satisfy s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), although no money in fact passed from B. to A. at the time the bill of sale was given.

THIS was an interpleader issue to try the right, as between the plaintiffs and the defendant, to certain goods which had been seized in execution at the suit of the defendant whilst they were in the possession of Augustus Albert Smith, the execution debtor. The goods had been assigned to the plaintiffs by the said A. A. Smith by a bill of sale dated the 21st of January, 1879, and duly registered under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and the question was whether the consideration for which it had been given was sufficiently set forth as required by s. 8 of that Act. The circumstances under which it was given were the following:—There had during several years been several loans and advances of money by the plaintiffs to the said A. A. Smith, in respect of which bills of sale had been given and renewed from time to time to avoid registration. Shortly before the bill of sale in question was given the parties met, and the amount due from the said A. A. Smith to the plaintiffs, after giving credit for payments, was ascertained to be the sum of 7350*l.*, besides 24,000*l.* for which the plaintiffs held security, and a further sum of 20,000*l.* for which the plaintiffs were liable as guarantors for Smith. The bill of sale in dispute in this action was then given to secure such 7350*l.* with interest. It recited that the said company had agreed to lend to the said A. A. Smith, who was therein described as the mortgagor, the sum of 7350*l.*, and after reciting also that the

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mortgagor was already indebted to the said company in 24,000*l.* and that the said company was liable as guarantors for the mortgagor in a further sum of 20,000*l.*, and that it had been agreed that the mortgagor should execute such deed as a security for the repayment of the said sum of 7350*l.* with interest, it went on as follows: "Now this indenture witnesseth that in pursuance of the said agreement, and in consideration of 7350*l.* now paid by the said company as the mortgagor doth hereby admit, he, the mortgagor, doth assign," &c. The said 7350*l.* and interest was, by the terms of the bill of sale, made payable to the company on demand, but such demand was to be by notice in writing.

The issue was tried at the Surrey summer assizes, 1879, before Pollock, B., without a jury, and as in fact no money passed between the company and Smith at the time the bill of sale was given, it was contended on behalf of the defendant, the execution creditor, that the consideration was not truly set forth. The learned judge, however, held that there had been substantially a fresh loan, and that the requirements of the Bills of Sale Act, 1878, were satisfied by the statement of the consideration, and he accordingly gave judgment for the plaintiffs.

The defendant appealed.

Morgan Howard, Q.C., and *Eyre Lloyd*, for the defendant. The 8th section of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), requires that every bill of sale to which that Act applies "shall set forth the consideration for which such bill of sale was given"—that means the true consideration. The bill of sale in dispute in this action does not set forth the true consideration. It is untrue to say that the company had agreed to lend any money or that any money was then paid by the company to Smith.

[BRETT, L.J. The question is whether what took place when the accounts between the parties were gone into did not amount to a fresh loan?]

It was not an agreement for a loan, but in fact to renew a previous bill of sale. The recitals in the deed makes a distinction between an indebtedness and an advance, and a stranger reading the bill of sale would infer that a sum was then paid and advanced by the company, which was not the fact.

[BAGGALLAY, L.J. There is nothing amounting to fraud. In *Hamlyn* v. *Betteley* (1) the statement that the money was paid to the grantor of the bill was sufficient, though the whole of the money was not in fact paid to him direct.]

In *Ex parte Charing Cross Advance and Deposit Bank* v. *Parker* (2), decided by the Court of Appeal from the Bankruptcy Court last November, the consideration for a bill of sale which was expressed therein to be 120*l.* was held not to be truly stated, as in fact only 90*l.* was paid and 30*l.* was retained by the grantees for interest and expenses. The Court distinguished that case from *Ex parte National Mercantile Bank, In re Haynes* (3), which will be relied on by the plaintiffs in the present case, on the ground that there the debt, to the payment of which part of the expressed consideration was applied, existed independently of the transaction of loan.

[BRETT, L.J. But in that case, although the consideration was expressed to be 2050*l.*, all that the grantor of the bill of sale got was 1500*l.*, and the 500*l.* was a sum added to the loan. If the consideration is wrongly set forth in the case now before us so it was in that case, and the decision there was wrong.]

There was in fact an advance of money in that case, but here there was none at all, and the statement of an agreement to lend is wholly untrue. The true consideration must be set forth, or the bill of sale is void: *Ex parte Berwick, In re Young* (4), and *Ex parte Carter.* (5)

Lumley Smith, Q.C., and *Atherley Jones*, appeared for the plaintiffs, but were not called upon.

LORD SELBORNE, L.C. It is not necessary to hear counsel for the plaintiffs. Looking at this deed apart from the Act of Parliament, it appears to me to be a bonâ fide transaction, and to be evidence as between the parties to it of the truth of what it states. It states that the company had agreed to lend to the mortgagor the sum of 7350*l.* It notices that the mortgagor was indebted to the company in a certain sum, and that the company were liable in a further sum as guarantors for the mortgagor, and

(1) 5 C. P. D. 327.
(2) 15 Weekly Notes, 16
(3) 15 Ch. D. 42.
(4) 15 Weekly Notes, 187
(5) 12 Ch. D. 908.

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it states that it had been agreed that the mortgagor should execute the deed as a security for the repayment of the said 7350*l.* with interest. It then witnesses that in pursuance of such agreement, and in consideration of 7350*l.* then paid to the mortgagor by the company, as the mortgagor did thereby admit, he, the mortgagor, assigned the goods which are the subject of the action. The deed contains a covenant by the mortgagor to pay the 7350*l.* on demand, which demand is to be in writing. Now, as between the parties to the deed, it appears to me that, as there was no fraud, the deed is conclusive evidence of the previously existing debt being satisfied, as much as if the money for it had been actually handed over; because, when the company treat the 7350*l.* as a new advance (and no money was in fact advanced, except by treating the previous debt as paid) the company could not then have said to the debtor that he owed the debt which had been previously contracted. As said by Mellish, L.J., in *Spargo's Case* (1), "it is a general rule of law, that in every case, where a transaction resolves itself into paying money by A. to B., and then handing it back by B. to A., if the parties meet together and agree to set one demand against the other they need not go through the form and ceremony of handing the money backwards and forwards." On the same principle James, L.J., in *Ex parte National Mercantile Bank* (2), said: "In cases of payment for shares in a company, we have frequently held that where there is a debt due from the company to a shareholder, and a debt for calls on shares due from him to the company, it is not necessary to go through the form of handing over the money and then handing it back again, but that the one debt may be set off against the other;" and he then adds, "in my view, the real consideration as between the grantor and grantee, the consideration which would have been properly stated in the deed if the Act had not been passed, is the consideration which ought now to be stated;" and Bramwell, L.J., expressly assents to that. Now that case of *Ex parte National Mercantile Bank* (3) differed in its circumstances from the present case, only in this respect, that there an antecedent debt was satisfied out of the advance, the advance being greater than the previous

(1) Law Rep. 8 Ch. 414. (2) 15 Ch. D. 53.
(3) 15 Ch. D. 42.

debt; but how does that make any difference? There is, I think, no substantial distinction between the two cases, and the rule so stated in *Ex parte National Mercantile Bank* (1) is applicable to the present case. One knows, when bankers advance money to their customers in the usual way, a sum is placed to the credit of the customer, and notwithstanding that it may happen that the whole is not drawn out, interest is charged on the whole, which is treated as an advance, even though in truth no money may have passed; and if a bill of sale were given as security for it to the bankers, the consideration would be truly described as an advance of money. So I think the bill of sale in the present case correctly sets forth the consideration; and the appeal must be dismissed.

BAGGALLAY, L.J. I am of the same opinion.

BRETT, L.J. The bill of sale here is under seal and what is stated in it cannot be contradicted by the parties to it, but a third party has a right to shew what are the real facts, and if such as relate to the consideration are not described in the bill of sale with substantial accuracy the bill of sale is ineffectual. Therefore the question is, whether the facts as to the consideration are stated in this bill of sale with substantial accuracy. Now I am inclined to agree that such facts are not strictly accurately stated, but then it will suffice if they are accurately stated either as to their legal effect or as to their mercantile and business effect, although they may not be stated with strict accuracy.

What took place was this,—an account was stated between the parties, and it was agreed that a certain sum should be taken as the amount due to the company, and that, in consideration of the debtor giving the security of a bill of sale, the sum so due, and which might have been demanded at once of the debtor, should be held over until it was demanded in writing. That arrangement was carried out by the bill of sale in question. Then what is the effect? Why the old debt which was payable at once was wiped out, and a new debt constituted which was payable only after a demand in writing. A new credit was thus given,

(1) 15 Ch. D. 42.

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and the effect is the same as if after taking the accounts, 7350*l.*, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of the 7350*l.*, and consequently the consideration is, I think, truly described in this bill of sale, both according to its mercantile and business effect and its legal effect.

Appeal dismissed.

Solicitor for plaintiffs: *E. Andrew.*
Solicitor for defendant: *T. W. Nelson.*

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[IN THE COURT OF APPEAL.]

THE QUEEN *v.* HUTCHINGS.

Estoppel—Res judicata—Justices, Summary Proceedings before—Adjudication that Street is a Highway—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *s.* 150.

An application to justices by a local board under the Public Health Act, 1875, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such expenses:—

Held, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment.

APPEAL from an order of the Queen's Bench Division (1) quashing an order of the quarter sessions of the hundred of Salford.

(1) 5 Q. B. D. 353.

The facts and authorities are fully stated in the judgment.

Dec. 9. *Hopwood, Q.C.*, for the appellants, the local board.

Ambrose, Q.C., and *Crump*, for the respondent, the owner of the premises.

Cur. adv. vult.

Jan. 15. The following judgments were delivered:—

LORD SELBORNE, L.C. The question in this appeal arises upon a special case stated by the quarter sessions of Salford under s. 269 of the Public Health Act of 1875, for the opinion of the High Court. Subject to the opinion of the High Court on that special case, the court of quarter sessions confirmed an order made on the 14th of November, 1879, by Sir John Mantell, a stipendiary magistrate, having the same authority with justices in petty sessions, for the payment of the sum of 442*l.* 0*s.* 5*d.* by the defendant Hutchins, to the urban authority for the district of Bradford in Lancashire. The Court below has quashed that order. There was a preliminary objection taken to our jurisdiction to entertain the appeal, but as it appeared that leave would have been given to appeal if a recent decision of the House of Lords had not been supposed to make it unnecessary, the objection was waived, upon an agreement between the parties that this appeal should be dealt with as if such leave (supposing it to be necessary) had been given. By s. 149 of the Public Health Act of 1875 (38 & 39 Vict. c. 55), the urban authority of Bradford was charged with the duty of (among other things) levelling, paving, flagging, and channelling all streets within the district, which were or should become highways repairable by the inhabitants at large. By the next section (s. 150) the duty of executing or defraying the costs of similar works was imposed upon the owners or occupiers of adjoining lands as to every street within the district which was not such a highway. The liability so imposed by s. 150 was to be thus enforced:—1, The urban authority was to give a notice to the owners or occupiers of the adjoining lands, requiring the works (which were to be specified in certain plans, sections, and estimates, open for inspection at the office of the urban authority) to be executed within a limited time; 2, If the notice were not com-

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and the effect is the same as if after taking the accounts, 7350*l.*, the sum found to be due, had been put into the hands of the creditors, and then handed back by them to the debtor to be repaid by him on demand in writing. Therefore both the legal effect and the mercantile and business effect of the transaction was as if there had been an actual advance in money of the 7350*l.*, and consequently the consideration is, I think, truly described in this bill of sale, both according to its mercantile and business effect and its legal effect.

Appeal dismissed.

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[IN THE COURT OF APPEAL.]

THE QUEEN *v.* HUTCHINGS.

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Held, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment.

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LORD SELBORNE, L.C. The question in this appeal arises upon a special case stated by the quarter sessions of Salford under s. 269 of the Public Health Act of 1875, for the opinion of the High Court. Subject to the opinion of the High Court on that special case, the court of quarter sessions confirmed an order made on the 14th of November, 1879, by Sir John Mantell, a stipendiary magistrate, having the same authority with justices in petty sessions, for the payment of the sum of 442*l.* 0*s.* 5*d.* by the defendant Hutchins, to the urban authority for the district of Bradford in Lancashire. The Court below has quashed that order. There was a preliminary objection taken to our jurisdiction to entertain the appeal, but as it appeared that leave would have been given to appeal if a recent decision of the House of Lords had not been supposed to make it unnecessary, the objection was waived, upon an agreement between the parties that this appeal should be dealt with as if such leave (supposing it to be necessary) had been given. By s. 149 of the Public Health Act of 1875 (38 & 39 Vict. c. 55), the urban authority of Bradford was charged with the duty of (among other things) levelling, paving, flagging, and channelling all streets within the district, which were or should become highways repairable by the inhabitants at large. By the next section (s. 150) the duty of executing or defraying the costs of similar works was imposed upon the owners or occupiers of adjoining lands as to every street within the district which was not such a highway. The liability so imposed by s. 150 was to be thus enforced:—1, The urban authority was to give a notice to the owners or occupiers of the adjoining lands, requiring the works (which were to be specified in certain plans, sections, and estimates, open for inspection at the office of the urban authority) to be executed within a limited time; 2, If the notice were not com-

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plied with, the urban authority might itself execute such works; and, 3, Having done so, it might recover in a summary way the expenses incurred in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as should be settled by the surveyor of the urban authority, or (in case of dispute) by arbitration. The cases of *Whitchurch* v. *Fulham Board of Works* (1) and *Vestry of Mile End Old Town* v. *Whitechapel Union* (2), shew, that every member of a class of persons, liable under provisions like these to contribute to such expenses, has an interest in their due and proper distribution and apportionment, so that a just quota may be borne by each of them.

Under ss. 251 and 257 of the Act such expenses are recoverable before a Court of summary jurisdiction, consisting of two or more justices in petty sessions, or of a single magistrate empowered for that purpose by law in the manner provided by 11 & 12 Vict. c. 43.

The question which the Court below has decided in favour of the defendant was whether, by reason of a former decision of justices in petty sessions dated the 7th of May, 1874, the Crown, or the urban authority of Bradford, was estopped from claiming payment of the sum demanded in November, 1879, as a quota of expenses due from the defendant under s. 150 of the Public Health Act of 1875. Besides the question of substance, there were some other questions of form, all which I assume (for the purpose of the present decision) in the defendant's favour. Mr. Justice Lush held that the defendant was entitled to the benefit of the estoppel claimed by him. Mr. Justice Field preferred to say that the former decision, of the 7th of May, 1874, was conclusive evidence in his favour. But I consider both those learned judges to have held in effect the same thing; the difference in their language being explained by such authorities as *Reg.* v. *Inhabitants of Haughton* (3), and the cases commented upon by Mr. Smith at pp. 799, 800, of 2 Leading Cases (7th ed.).

The justices in petty sessions, on the 7th of May, 1874, dismissed a summons taken out by the same urban authority against the

(1) Law Rep. 1 Q. B. 233. (2) Law Rep. 1 Q. B. D. 680.
(3) 1 E. & B. 512, 516.

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same defendant for the quota apportioned to him under s. 150, of certain expenses incurred in sewering and channelling a street called Mill Street adjoining land belonging to him as owner; and the special case states, as the ground on which they dismissed that summons, that they then adjudicated and found that the said street was a highway repairable by the inhabitants at large. Afterwards, in another similar proceeding against one Cunliffe, another adjoining owner, upon evidence which was not before them on the 7th of May, 1874, the same or other justices in petty sessions came to an opposite conclusion, and ordered payment by Cunliffe of the amount then claimed against him, considering that Mill Street was not such a highway. The dismissal of the former summons against the present defendant, and the ground of it was given in evidence on that occasion. When the summons of 1879 against the present defendant for his share of the expenses of new and different works (levelling, paving, and flagging) in the same street, was heard by the stipendiary magistrate, it was agreed that all the evidence in Cunliffe's case should be treated as then before him; and upon that evidence he found the defendant liable, holding either that there was no estoppel in the defendant's favour by the proceedings of 1874, or that (if there was) it was set at large by the subsequent decision in Cunliffe's case.

I am of opinion that there was in law no estoppel; that Sir John Mantell's order was right in substance; and that the present appeal from the order made in the Queen's Bench Division ought to be allowed. I think so, because of the nature of the liability in question, and the nature and limits of the summary jurisdiction which the justices exercised on the 7th of May, 1874.

We have in this case, nothing at all to do with any judgment in rem. If we had, there might be ground for holding that there were two cross and contradictory estoppels, one by the judgment for the present defendant in 1874, and the other by the contrary judgment against Cunliffe, the effect of which might have been to set the whole matter at large. But here there is no proceeding in rem, no question of status; and if the case which was quoted to us of *Reg* v. *Inhabitants of Hartington* (1) was correctly decided (as to which I feel considerable doubt) it is not relevant.

(1) 4 E. & B. 780, 792.

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The principles of the law of estoppel by a judgment, inter partes, to which alone I think it necessary to refer, may be taken from Chief Justice De Grey's opinion in the *Duchess of Kingston's Case* (1), and from that of Vice-Chancellor Knight Bruce in *Barrs* v. *Jackson*. (2) The decision in the latter case was reversed, but on a ground not at all touching the statement of principles contained in it.

"The judgment" (said Chief Justice De Grey) "of a court of concurrent" (or of exclusive) "jurisdiction, *directly upon the point*, is conclusive upon the same matter between the same parties coming incidentally in question in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence" (that is, as I understand the meaning of the Chief Justice, conclusive evidence) "of any matter which came collaterally in question, though within their jurisdiction; *nor of any matter incidentally cognisable*, nor of any matter to be inferred by argument from the judgment." Vice-Chancellor Knight Bruce said, "It is, I think, to be collected that the rule, against re-agi tating matter adjudicated, is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided *the immediate subject of the decision* be not attempted to be with drawn from its operation, *so as to defeat its direct object.*"

To these may be added the principle, on which the limitation of estoppel per rem judicatam to parties and privies depends, that *res inter alios acta alteri nocere non potest.*

We are not in this case called upon to determine how far, or under what conditions, an order of a court of summary jurisdiction may operate between the parties to it as an estoppel. Assuming that it may do so to some extent, and under some conditions, I conceive it to be clear that it cannot so operate, 1, as to any matter as to which that Court had no authority to adjudicate

(1) 2 Sm. L. C. (7th ed.) 761. (2) 2 Sm. L. C. (7th ed.) 807.

directly and immediately between the parties; 2, as to any matter incidentally coming in question, as to which a finding, if held to be conclusive between the parties, would operate in prejudice of the rights of others not parties to the proceeding: or, 3, as to any incidental matter not otherwise determined, than as having been the particular ground on which the Court dismissed a charge or complaint.

The justices, before whom the complaint of the urban authority came on the 7th of May, 1874, had no jurisdiction to adjudicate directly or immediately between these parties (or between any parties whatever) on the question whether Mill Street was or was not a highway repairable by the inhabitants of Bradford at large. That was, at the most, a matter "incidentally cognisable" by them. No conclusion which they might form upon it could establish (in the one case) or disprove (in the other) any such liability, as against or in favour of the inhabitants. Their only jurisdiction was to make or refuse the order for payment of a certain sum of money, then claimed as the defendant's statutable quota of certain expenses, at that time incurred by the urban authority.

To hold the Crown or the urban authority estopped for ever from claiming payment of the defendant's quota of any other expenses of a like character, afterwards incurred in respect of the same street, because on the 7th of May, 1874, the justices in petty sessions held the street to be a highway repairable by the inhabitants at large, would (if it were not really such a highway) be to deprive the other adjoining landowners, who were not parties or privies to the proceeding, of their statutable right to have a just rateable contribution from the defendant, and his successors in estate, to all future expenses apportionable among all the adjoining landowners, under s. 150 of the Public Health Act. And if the decision under appeal were correct, it would follow (perhaps à fortiori) that Mr. Cunliffe, and all persons claiming under him, are also estopped from asserting that Mill Street is a highway repairable by the inhabitants at large. There would therefore be, within the same district, two laws operating simultaneously in opposite directions as against different persons in exactly the same circumstances, under the same words of taxation, in the same public Act of Parliament; and either imposing upon some of

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those individuals and their privies in estate a liability which the statute had not in fact imposed, or exonerating others and their privies in estate (to the prejudice of the rest) from the share of a common burden which the statute had imposed equally upon all.

Furthermore:—the order of dismissal cannot (in my opinion) have any greater force or effect by way of estoppel, than if it had been actually drawn up in the proper form, prescribed by 11 & 12 Vict. c. 43, s. 14 (Form L.):—in which case, it would only have found that the complaint of the urban authority was *not proved*. Such an order, being at the most equivalent (in this quasi-criminal proceeding) to an acquittal, could not have operated as an estoppel, except against a repetition of the same demand for the same quota of the same expenses. (See Buller's N. P. 245; 1 Gilb. Ev. Lofft's ed. p. 34; *Rex* v. *Inhabitants of Burbon.* (1))

I think therefore that this appeal must be allowed.

BRETT, L.J. I agree in the judgment just delivered by the Lord Chancellor, and I have been requested by Baggallay, L.J., who is now on circuit, to say that although he doubts he does not dissent from that judgment.

Appeal allowed.

Solicitors for appellants: *Gregory & Co.; for H. & G. W. Fox.*

Solicitors for respondent: *Norris, Allen & Co.; for Diggles & Ogden.*

(1) 5 M. & S. 392.

GOFFIN *v.* DONNELLY.

1881
Feb. 25.
Q. B. D.

Slander—Privilege of Witness—Parliament—Select Committee of House of Commons.

To an action of slander defendant pleaded that the statements complained of were part of the evidence given by him in the character of a witness before a Select Committee of the House of Commons:—

Held, that the statements so made were privileged, and that the action would not lie.

ACTION for slander.

Statement of defence stated that the Commons House of Parliament had ordered a Select Committee to be appointed to inquire into and report upon the circumstances relating to the suspension of the certificate of the plaintiff, who was a schoolmaster, by the Science and Art Department: that a committee consisting of members of the said House was nominated, and that it was further ordered that the committee should have power to send for persons, papers, and records: that such committee thereupon met from time to time and made a report to the said Commons House of Parliament, and did all things appertaining to such inquiry: that the said committee, in the course of its inquiry, summoned the defendant as a witness, and administered an oath to him, as they lawfully might, and that the words set out in the statement of claim were extracts from the evidence given by the defendant before such committee in the character of a witness, and not otherwise.

Demurrer.

E. Clarke, Q.C. (*English Harrison*, with him), for the plaintiff.

Sir Henry James, A.G. (*A. L. Smith*, with him), for the defendant.

The following cases were cited: *Seaman* v. *Netherclift* (1); *Dawkins* v. *Lord Rokeby.* (2)

FIELD, J. I am of opinion that this is a good defence. The principle which appears to me to govern this case is very clearly

(1) 2 C. P. D. 53. (2) Law Rep. 7 H. L. 744.

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laid down in the case of *Seaman* v. *Netherclift*. (1) The decision in that case was that a witness in a court of justice is absolutely privileged in respect of the evidence he gives. The argument of the plaintiff's counsel against the privilege alleged in this case would have been equally applicable there. It was argued that it was contrary to natural justice that a man should be allowed to be prejudiced by statements made before a select committee, upon an occasion when he could have no opportunity to rebut such statements, and to shew that the imputations made upon him were unfounded; but the statement made by the defendant in *Seaman* v. *Netherclift* (1) affected a person who was not present, and who had no opportunity of vindicating himself on the occasion when the statement was made. It may be a hardship upon individuals that statements of a defamatory nature should be made concerning them, but the interest of the individual is subordinated by the law to a higher interest, viz., that of public justice, to the administration of which it is necessary that witnesses should be free to give their evidence without fear of consequences. The plaintiff's counsel drew a distinction between a court of justice and the tribunal before which the statements in this case were made. Can such a distinction be drawn? The House of Commons, in the performance of its functions and for the purposes of legislation, has to inquire into many matters, and among others the conduct of that department of government which deals with education. For the purposes of such inquiries committees are appointed, and require the attendance of witnesses. If persons so required to attend did not attend, they would be committed for contempt. If they do attend they must answer the questions asked of them, and may be examined on oath. The evidence given is, therefore, as much given under compulsion as in the case of a court of law. For these reasons this seems to me to be a stronger case of privilege than some of the occasions that have been held to be clearly privileged.

MANISTY, J. It was held in *Dawkins* v. *Lord Rokeby* (2) that statements made before a military court of inquiry, which could not administer an oath, were as much privileged as evidence given

(1) 2 C. P. D. 53. (2) Law Rep. 7 H. L. 744.

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in a court of justice. I think this is an à fortiori case, it being admitted that the Select Committee has power to enforce the giving of evidence by committal. There is no case directly in point, but there are authorities of the strongest character to establish the principle upon which the claim of privilege in this case is founded. For these reasons I agree that our judgment must be for the defendant.

Judgment for the defendant.

Solicitors for plaintiff: *Baker & Nairne.*

Solicitors for defendant: *Hare & Fell, for Solicitors to the Treasury.*

[IN THE COURT OF APPEAL.]

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Dec. 20.

THE QUEEN *v.* SAVIN.

(C. A.)

Q. B. D.

Practice—Case stated by Quarter Sessions for Opinion of Queen's Bench Division—Appeal to the Court of Appeal—Leave to Appeal when necessary—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 45.

Where the Queen's Bench Division in the exercise of its original common law jurisdiction affirms or quashes an order of sessions, an appeal lies to the Court of Appeal although no leave to appeal be given.

APPEAL of defendant from an order of Lush and Manisty, JJ., affirming an order of quarter sessions.

An order of justices having been made under s. 23 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), ordering the defendant to pay to the complainants the expenses incurred in the repair of a certain highway, by reason of damage caused by excessive weight and extraordinary traffic conducted thereon by the defendant, the defendant appealed to the quarter sessions. The sessions affirmed the order, subject to a case stated for the opinion of the Queen's Bench Division. The Queen's Bench Division affirmed the order of sessions and refused leave to appeal. The defendant appealed notwithstanding.

J. H. Etherington Smith, for the respondents. There is a preliminary objection. The Court has no jurisdiction to hear this appeal, leave to appeal having been refused. In the case of *Hinton* v.

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THE QUEEN v. SAVIN.

(C. A.) Q. B. D.

Swindon New Town Local Board (1) it was held that an appeal from the decision of the Queen's Bench Division, on a special case stated by the quarter sessions under s. 269, sub-s. 7, of the Public Health Act, 1875, did not lie, no leave to appeal having there been given. The decision however in that case turned on the fact that the Queen's Bench Division were not there acting in the exercise of the original jurisdiction which they have at common law to supervise generally the decisions of inferior tribunals, but in the exercise of an appellate jurisdiction conferred on them by the section of the Public Health Act above mentioned. That case therefore, it must be admitted, does not govern the present, for there is no corresponding section in the Highways and Locomotives Amendment Act, 1878, empowering the sessions to state a case for the opinion of a superior Court. In the present case, as in that of *Overseers of Walsall* v. *London and North Western Ry. Co.* (2), the Queen's Bench Division were exercising their original jurisdiction. In the last mentioned case it was held that the appeal lay, but there leave to appeal was in fact given. And though Lord Cairns there suggested (3) that leave was in such a case unnecessary, the point was left undecided.

McIntyre, Q.C., and *Graham*, for the appellant, were not heard on the preliminary objection.

LORD SELBORNE, L.C. We think that leave to appeal was unnecessary. We must proceed to hear the appeal.

BAGGALLAY and BRETT, L.JJ., concurred.

Solicitors for appellant: *Field, Roscoe, & Co.*

Solicitors for respondents: *Simpson, Hammond, Richards, & Simpson.*

(1) 42 L. T. (N.S.) 614. (2) 4 App. Cas. 30.
(3) 4 App. Cas. at p. 42.

THORPE AND OTHERS *v.* BESTWICK.

1881
March 9.
Q. B. D.

*Will—Attesting Witness—*1 *Vict. c.* 26, *s.* 15*—Marriage of Devisee after Attestation to attesting Witness.*

Under the Wills Act (1 Vict. c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise.

ACTION to recover possession of a house at West Hill, Derby, devised in 1865 by Jeremiah Bestwick to his niece Ann Rebekah Wolstenholme, who in 1868 married the plaintiff Thorpe.

Defence: That A. R. Wolstenholme married the plaintiff Thorpe before the death of the testator, and that at his death the marriage was still subsisting; and that Thorpe was one of the witnesses to the execution of the will.

Demurrer.

Graham, in support of the demurrer. The fact that the devisee married the attesting witness after the date of the will cannot affect the devise. The material sections of the Wills Act, 1 Vict. c. 26, are s. 15 and s. 24. (1) Sect. 15 enacts that devises to an attesting witness, or his or her wife or husband shall be void, and s. 24, that a will is to speak from the death of the testator. But it has been expressly held, in *Bullock* v. *Bennett* (2), that s. 24 does not apply to the objects of the testator's bounty, but only to the estate comprised in the will, Lord Justice Turner saying that he understood the section to mean that the will is to speak as if executed immediately before the testator's death, not with reference to the objects of his bounty, but with reference to the real and personal estate to be taken by those objects. And in Jarman on Wills, 3rd ed. vol. i. pp. 65, 66, it is explained that the rule

(1) By 1 Vict. c. 26, s. 15, if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, &c., shall be thereby given or made, such devise shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be utterly null and void.

By s. 24, every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

(2) 24 L. J. (Ch.) 512.

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before the Wills Act was that, when an attesting witness was disqualified by reason of his being a devisee under the will, the disqualification must exist at the period of the attesting act. The cases cited in the note at the bottom of the page do not affect this principle.

J. F. B. Firth, for the defendant. Sect. 14 of the Act, enacting that if any person who shall attest the execution of a will shall, at the time of the execution or at any time afterwards, be incompetent to prove the execution, such will shall not on that account be invalid—contemplates that the witness may become incompetent after the execution of the will and before the death of the testator. To uphold the present devise would enable an attesting witness who took a devise under the will to secure himself by antedating it.

Graham, was not heard in reply.

MATHEW, J. I think the plaintiffs are entitled to judgment. The policy of the Wills Act, 1 Vict. c. 26, in depriving the attesting witness of any legacy given by the document of bequest, is not to allow wills to be proved by the evidence of persons benefited by them, and it makes void any devise to an attesting witness, or to his or her wife or husband. In the present case the plaintiff, at the time when the will was attested, took no benefit under it, but he subsequently married the devisee, and I am asked to hold that the result of this marriage is to destroy the validity of the devise. But there is no such provision in any part of the Act; the only section which could be referred to is s. 24, by which every will is to take effect as if it had been executed immediately before the death of the testator. This section has been commented upon and fully interpreted in *Bullock* v. *Bennett* (1), and it is clear that it does not apply to those benefited by the devise, but only to the property to be taken by them. There is, therefore, nothing to affect the validity of this devise.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Peacock & Goddard, for Clark & Huish, Derby.*

Solicitors for defendant: *Watson, Sons, & Room.*

(1) 24 L. J. (Ch.) 512.

RICHARDSON, APPELLANT; SAUNDERS, RESPONDENT.

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Feb. 24.
Q. B. D.

Elementary Education Acts—Attendance Order—Child attending Board School without Fees—Liability of Parent—39 & 40 *Vict. c.* 79, *ss.* 10, 11, 12; 33 & 34 *Vict. c.* 75, *s.* 17.

A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school and that he do see that the order is complied with, causes the child to attend the school but without the school fees, is not liable to conviction under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order, although he may have failed to apply to the guardians under s. 10, to pay the fees, and refused to obtain a remission of them under 33 & 34 Vict. c. 75, s. 17.

CASE stated by justices under 42 & 43 Vict. c. 49.

On the hearing of an information preferred by the respondent on behalf of the school board of the parish of Belgrave in the county of Leicester, under s. 12 of 39 & 40 Vict. c. 79, that on the 14th of October, 1880, at the parish of Belgrave, Jonathan Richardson (the appellant) of the parish of Belgrave, then being the parent of a child named Amy Richardson, residing within the parish and subject to the provisions of the Elementary Education Acts or one of them, unlawfully did not cause the child to attend school as required by an attendance order made by a court of summary jurisdiction on the 21st of August, 1880, the justices convicted the appellant of the said offence and adjudged him to pay the sum of 5*s.*, and in default of payment of the sum ordered that the same should be levied by distress or sale of the appellant's goods, and in default of sufficient distress that he should be imprisoned for the space of five days, unless the said sum and all costs and charges of the distress and of his commitment and conveyance to prison should be sooner paid.

The following facts were either proved before the justices or admitted by both parties.

That an attendance order had been made by a court of summary jurisdiction and served upon the appellant which stated: "We do order the said Amy Richardson to attend the board school, being a certified efficient school at Belgrave, in the said county of Leicester, every time the said school shall be open, and that the said defendant do see that this our order is complied with."

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That the appellant had caused his child Amy Richardson to attend the said school.

That the appellant had not sent with his child the school fees payable by such child attending the school.

That, in consequence of such school fees not having been sent with the child, the child was refused admission to the school.

That the respondent had on three occasions requested the appellant to attend before the school board to obtain remission of the school fees if he was not able through poverty to pay them.

That the appellant on each occasion refused to attend before the school board to obtain a remission of the school fees, and has not attended nor has he obtained such remission.

That the respondent under the directions of the school board had inquired and ascertained in the month of August, 1880, that the appellant was then unable to pay the school fees, and he also stated before the justices that he was satisfied that the appellant was out of work in the said month of October.

It was contended on the part of the appellant that he had complied with the attendance order, his child Amy Richardson having been duly sent to school, but refused admission on the ground that she was not provided with money to pay the school fees.

On the part of the respondent it was contended that to entitle the appellant's child to attend the school the school fees must be prepaid, that, if he was not able through poverty to pay the school fees, he must apply to the school board under s. 17, of 33 & 34 Vict. c. 75, for a remission of the same.

The justices being of opinion that the attendance at the school without the school fees was not a compliance with the attendance order, and that if through poverty the appellant could not pay the school fees he should have applied to the school board for a remission, and that therefore the appellant had not used all reasonable efforts to comply with such attendance order, gave their determination against the appellant in the manner before stated.

The question of law upon which the case was stated for the

opinion of the Court was whether the appellant was properly convicted of not complying with the attendance order, his child, Amy Richardson, having been sent to school but refused admission on the ground that she was not provided with the school fees, and the appellant having refused to apply to the school board for a remission thereof.

Hensman, for the appellant. The conviction is bad. The appellant has complied with the attendance order by sending his child to the school. Neither the Elementary Education Acts (33 & 34 Vict. c. 75, s. 74; 39 & 40 Vict. c. 79), nor any by-laws made under them, compel him to send fees with the child or impose a penalty on him if he does not send them.

[He was stopped.]

Douglas Walker, for the respondent. In the schools supplanted by board schools the fees were always paid in advance, and they are required to be so now in the board schools as there is no provision in the Acts for the recovery of fees. By 33 & 34 Vict. c. 75, s. 17, every child attending a school board shall pay a weekly fee, but the school board may remit it if the parent is unable through poverty to pay it. Sect. 74 as affected by repeal of s. 25, gives power to make by-laws as to the remission of fees only. But 39 & 40 Vict. c. 79, s. 4, first imposed on the parent the legal duty of educating his child. By s. 10 if unable by poverty to pay the fee, he may apply to the guardians to do so. Sect. 11 provides that if he habitually and without reasonable excuse neglects to provide efficient elementary instruction for his child, a court of summary jurisdiction may make an attendance order; and s. 12, that where an attendance order is not complied with without any reasonable excuse within the meaning of the Act, the Court may, if he fails to satisfy the Court that he has used all reasonable efforts to enforce compliance with the order, impose a penalty not exceeding with the costs five shillings. He has not used such efforts, for he might have procured a remission of the fees under 33 & 34 Vict. c. 75, s. 74, sub-s. 3, and under s. 10 might have applied to the guardians whose duty it would then have been to pay them. There is no finding that he could not pay the fees but merely that he was out of work. Attendance

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without the fees is no attendance of the child at all within the meaning of the order.

Hensman, in reply. The appellant might have obtained a remission of the fees, but is not liable to imprisonment for failing to obtain it. No by-law prescribes that the child shall attend with the fees. The order is only that the child do attend, but the respondent would import into the order the words "with the fees." Attendance, however, means physical attendance and no more. This is evident from the terms of 33 & 34 Vict. c. 75, ss. 17, 36, and s. 74, sub-s. 2, and 39 & 40 Vict. c. 79, s. 11, which created a fresh offence, viz., habitually neglecting to provide sufficient elementary education. There are two distinct offences; first, not causing the child to attend, and, second, habitually neglecting to do so: *Ex parte The School Board for London. In re John Murphy.* (1) The one is punishable under a by-law by a fine, the other is dealt with in s. 11. This attendance order appears to be made under s. 11, and the conviction is evidently under s. 12. If it was under a by-law it ought to be set forth.

LINDLEY, J. This case, though of considerable importance, is simple enough as stated by the justices, and the question is whether sending a child to the board school without the fees, which are assumed in this case to be payable, is a breach of an attendance order. It does not appear on what authority that order was made, whether under some by-law or some section of the Elementary Education Act, 1876. The order is in the following terms: "We do order the said Amy Richardson to attend the board school, being a certified efficient school at Belgrave, in the said county of Leicester, every time the said school shall be open, and that the said defendant do see that this our order is complied with." The case finds that the appellant did cause his child to attend the school, viz., to go to the school, and the question is whether that is or is not a compliance with the order. In one sense, of course, it is, but the question is in what sense the word "attend" is used in that Act which authorizes the order to be made. At first sight it seems plain that he had complied, and on second thoughts I think he has complied with the order; but I had some misgivings,

(1) 2 Q. B. D. 397.

because our attention was directed to s. 10, which enables the parent to apply to the guardians to pay the fee. So, although he has sent his child to school without the fee, and he is a poor man, yet there was a method of getting the fee paid. I think the passing doubt I had was unfounded, and that according to the true construction of the Act he has caused his child to attend the school. I quite see the consequence. It is that through some omission there may be a difficulty in forcing him to pay the fees or to get a remission of them, but we cannot correct that omission by straining the sections of the Act. On looking through the sections I think it becomes more and more plain that the word "attend" has its primâ facie meaning. The excuses for non-attendance cannot in any way attach to non-payment of fees, s. 16 shews the distinction between ordering attendance and ordering that, if necessary, the father shall maintain the child. I cannot see that the Act means more than that "You shall send the child to school," and if there is a wish either that the child shall be sent with a clean face or money in hand, by-laws must be made to enforce it. I think the appellant has complied with the attendance order, and that the conviction must be quashed.

LOPES, J. The appellant has been convicted of unlawfully not causing his child to attend a board school, and adjudged to pay a fine of five shillings and in default be imprisoned for five days. It is admitted that he did send his child to school, but it also admitted, on the other hand, that he did not send the school fees with the child. The respondent contends that attendance without the fees is no attendance at all, and it is said that because the father if he had chosen could have obtained remission, and if not able to pay he could have gone to the guardians and have got the money paid, he therefore has committed the offence charged. We are asked to say that the word "attend" in the statute does not mean "attend" in the ordinary sense of the word, but means "attend with school fees in hand." I do not think that in any case I could adopt that view, certainly in this case, which is on a stringent Act of Parliament, it would be impossible to import those words not in the statute, which do not, I think, follow from words used in the statute. I think that "cause to attend" means

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"send to school" and nothing more. There may be a difficulty in getting the fees under the circumstances, but if so that must be provided for by the legislature. I should be sorry to put the construction on the word attend which we are asked to do in the present case.

Conviction quashed, with costs.

Solicitor for appellant: *H. Montagu.*

Solicitors for respondent: *Gedge & Co.*

Feb. 25.

Q. B. D.

STEVENS AND ANOTHER *v.* WOODWARD AND OTHERS.

Negligence—Master and Servant—Solicitor and Clerk—Scope of Authority.

The plaintiffs occupied premises beneath the offices of the defendants who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to wash his hands at the lavatory after his employer had left, turned the water tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them.

In an action for negligence:—

Held, that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable.

APPEAL from the Lord Mayor's Court.

Action for negligence. At the trial before the Recorder it appeared that the plaintiffs occupied premises beneath the offices of the defendants who were solicitors. Evidence was given for the plaintiffs that a quantity of water had come from the offices of the defendants, and it was found to have escaped from a tap left open in a lavatory there. It damaged the property of the plaintiffs. At the close of the plaintiffs' case, counsel for the defendants submitted that there should be a nonsuit as there was no evidence that the defendants or any servant of them had been guilty of negligence, and he cited *Ross* v. *Fedden.* (1) The learned judge declined to nonsuit, whereupon evidence for the defendants was given, and one of them said: "The lavatory is in my room, and is for my own use exclusively, and my orders are

(1) Law Rep. 7 Q. B. 661.

that no clerk shall come into my room after I have left. I left the office on the 12th of August, at 5.45, after washing my hands and turning off the tap." A clerk of the defendants said, "I went into the room of the last witness to wash my hands. I turned the tap and the water did not flow, and then I went out." The jury found a verdict for the plaintiffs for 15*l.*, and leave was reserved to the defendants to move for a nonsuit if the Court should be of opinion that there was no evidence of negligence, or that under the circumstances the defendants were not liable.

A rule having been obtained accordingly,

Candy shewed cause. The learned Recorder was right in refusing to nonsuit, and also in leaving the case to the jury. They have decided the question. If the master himself had left the tap open he would have been undoubtedly liable. The clerk to a solicitor is more than a servant, he acts for his employer in his absence. Here the clerk was in the office during working hours, and it was part of the routine of the day's work to wash his hands. It is the general practice for such clerks to wash their hands in the offices where they are employed. Here the clerks' room contained a lavatory for their use, but the water failed there, and so the clerk went to the other room. That he was forbidden to do so is irrelevant: *Whatman* v. *Pearson*. (1) He was acting within the scope of his employment: *Venables* v. *Smith*. (2) This case is not like *Storey* v. *Ashton* (3), where the defendant's carman after business hours drove a clerk out on business of his own, and was negligent while on the independent journey. In such cases no doubt the master is not liable: *Mitchell* v. *Crassweller*. (4) The question is whether the subordinate is acting within the scope of his authority if he be an agent, or in the course of his employment if he be a servant. The clerk here was so acting.

Petheram, Q.C. (*De Witt*, and *G. G. Kennedy*, with him), in support of the rule. The principle is well stated in *Whatman* v. *Pearson* (1) by Montague Smith, J. Here the clerk was acting for himself, and on his own responsibility. His duty was clearly to keep in his own room, and not to wash his hands in the

(1) Law Rep. 3 C. P. 422.
(2) 2 Q. B. D. 279.
(3) Law Rep. 4 Q. B. 476.
(4) 13 C. B. 237.

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room of his master. Could it be said that the master would have been liable if the clerk had washed his hands at some tavern near during office hours and had left the tap there running? His negligent act was not in the scope of his employment, and the defendants are not answerable for the consequences. If the contention for the plaintiffs were right, a master would be liable for any independent and wrongful act of the servant done on the employer's premises.

GROVE, J. I am of opinion that the verdict should be entered for the defendants. No doubt this question is a very nice one, and there may be cases close to the line between the liability and non-liability of a master for the act of another person done in the "course of his employment" if he is servant, or within the "scope of his authority" when he is an agent, for as Mr. Candy well says, such is the mode in which those terms have been applied by the courts, although the words "scope of authority" may cover both cases. The facts are simple. The defendants were solicitors with a clerk who had an office or some room in which he was entitled to be, and where, if he wished to wash his hands he could, as the learned counsel admits, wash them. The master left the premises, whether finally for the evening or not does not distinctly appear, nor is it I think material. He had left, and he says, "The lavatory is in my room, and is for my own use exclusively, and my orders are that no clerk shall come into my room after I have left." The clerk therefore would have no right to enter contrary to this particular prohibition, primâ facie at least he would not be entitled to do so, and the onus would lie on the plaintiffs to shew that the clerk had permission to use his master's room. The case is a little stronger by reason of the prohibition, but I quite agree with Mr. Candy that there are cases where a prohibition would have no effect, and I cannot put a nearer one than that I suggested during argument: suppose this were not a clerk but a housemaid whose duty it was to clean up the room and attend to the lavatory and wipe out the bason, then I think, that although she was expressly prohibited from using the bason, and was told not to leave the tap open, yet, notwithstanding the prohibition, her act of using the bason and

omitting to turn off the water would be so incident to her employment that the master would be liable. Although a definition is difficult, I should say that the act for which the master is to be held liable must be something incident to the employment for which the servant is hired, and which it is his duty to perform. All the cases tend to shew, and *Mitchell* v. *Crassweller* (1) and *Storey* v. *Ashton* (2) point out clearly that line of distinction; in one case a servant was employed to drive his master's cart, and after coming home to the stable started off on a fresh journey for his own purposes, and during that second journey, which was not incident in any way to his employment, an accident happened; in the other case, which goes a little further, before the servant put up the cart he turned off and went in another direction making a détour, and an accident happened; in both those cases the master was held not liable. I think I should have come to the same conclusion as that I have arrived at if there had been no express prohibition in the case, and it had merely been shewn that the clerks had a room of their own and a lavatory where they could wash their hands. Then what possible part of the clerk's employment could it be for him to go into his master's room to use his master's lavatory, and not only the water but probably his soap and towels solely for his, the clerk's, own purposes? What is there in any way incident to his employment as a clerk? I see nothing. The case seems to me just the same as if he had gone up two or three flights of stairs and washed his hands in his master's bedroom. It is a voluntary trespass on the portion of the house private to his master. I do not use the word trespass in the sense of anything seriously wrong, but he had no business there at all. In doing that which his employment did not in any way authorize him to do he negligently left the stop-cock open, and the water escaped and did damage. I think there was nothing in this within the scope of his authority or incident to the ordinary duties of his employment. Then it is said that is a question for the jury, and that if there is evidence on both sides the Court is bound to accept the finding of fact. That is so where there is a conflict of evidence, but there is no conflict here. The plaintiffs'

(1) 13 C. B. 237. (2) Law Rep. 4 Q. B. 476.

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case was one of apparent probability, that the water came from premises in which a stop-cock was left open. That might happen in various ways, but the learned Recorder seemed to think he must assume, until the contrary was shewn, that there was an implied liability on the defendants. If however that was removed by uncontradicted evidence shewing the implication to be a mistake, as it would have been if the defendants had shewn that a stranger, some friend of one of the clerks, had come in and washed his hands in the lavatory and had left the stop-cock open, surely those facts would dispose of the primâ facie liability. The prohibition is material as shewing the local limit of the clerk's duties. The case is wholly free from any conflict of evidence, for the jury believed the evidence given both for the plaintiffs and the defendants, it being quite consistent. The evidence for the plaintiffs made out a ground of liability, and the evidence for the defendants limited it, by shewing that the clerk was not in the relation of servant to the master in respect of this particular act of neglect. I think the judgment should be for the defendants.

LINDLEY, J. I am of the same opinion, and I agree for much the same reasons. I do not see on what principle the defendants are to be held liable for a negligent act of a man who trespasses in their room and leaves their tap running. The facts shew that the clerk was a trespasser after his master had left. I think this a plain case, and that our judgment should be for the defendants with costs.

Rule absolute.

Solicitor for plaintiffs: *Owles.*
Solicitor for defendants: *John Knight.*

[IN THE COURT OF APPEAL.]

1880
Dec. 15.

(C. A.)
C. P. D.

HARMON *v.* PARK AND ANOTHER.

Municipal Corporation—Election Petition—Corrupt Practices (*Municipal Elections*) *Act*, 1872 (35 *&* 36 *Vict. c.* 60), *s.* 13, *subs.* 6—*Mayor made Respondent in a Petition—Returning Officer—Complaint of Conduct of—Ballot Act* (35 *&* 36 *Vict. c.* 33), *s.* 20—*Municipal Corporations Act* (5 *&* 6 *Wm.* 4, *c.* 76), *s.* 43—*Municipal Election Petition Rules*, 1872, *rule* 44—*Judicature Act*, 1873, *s.* 19.

Where a mayor has bonâ fide given a decision under 38 & 39 Vict. c. 40, s. 1, subs. 3, on the validity of an objection made to a nomination paper, a complaint of such decision as erroneous is not a "complaint of the conduct" of such mayor within the meaning of 35 & 36 Vict. c. 60, s. 13, subs. 6.

At the election of a councillor for a ward in a borough the mayor is not the returning officer within the meaning of s. 20 of the Ballot Act, unless he also happens to be alderman of such ward, or unless the office of alderman in such ward be vacant.

From an order of a divisional court upon an interlocutory matter arising in an election petition, an appeal lies to the Court of Appeal.

A VACANCY having arisen in the office of councillor in the West Ward of the borough of Sunderland, two persons only were nominated as candidates for the vacant office—the petitioner and the respondent Park. The surname of the petitioner, though correctly spelt in his nomination paper, had by mistake been entered as Harmond upon the burgess roll. An objection having been taken to the validity of the petitioner's nomination paper, on the ground that the name therein did not correspond with that on the burgess roll, the mayor allowed such objection, and thereupon declared the respondent Park to be duly elected. The alderman of the West Ward subsequently published Park's name as that of the person who had been elected, in compliance with the provisions of 22 Vict. c. 35, s. 8. Harmon petitioned against the election, and made the mayor a respondent to such petition. The petition, however, did not complain of any conduct on the part of the mayor other than his decision upon the objection to the petitioner's nomination paper above mentioned, nor did it suggest that such decision had been pronounced otherwise than bonâ fide.

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Upon motion to Stephen, J., at chambers, to strike the name of the mayor out of the petition, the learned judge being of opinion that the mayor was not a returning officer and had, therefore, been improperly joined as a respondent, ordered his name to be struck out. Upon appeal to the Common Pleas Division, Denman and Lindley, JJ., reversed the decision of Stephen, J., and ordered the name of the mayor to be restored. The mayor appealed.

Gainsford Bruce, for the petitioner. There is a preliminary objection to the jurisdiction of the Court to entertain the appeal. The decision of the Common Pleas Division was final. This is an interlocutory proceeding in an election petition under the Corrupt Practices (Municipal Elections) Act, 1872. By s. 15, subs. 6, of that Act, the case raised by a municipal election petition may be stated as a special case for the opinion of the superior Court, and the decision of the superior Court thereon is to be final. By s. 2 the superior Court is defined to be the Court of Common Pleas at Westminster. By s. 16 of the Judicature Act, 1873, the jurisdiction of the Common Pleas is transferred to the High Court, to the Common Pleas Division of which there are assigned, by s. 34, all matters of which the Common Pleas had exclusive cognizance before the passing of that Act. If, then, the decision of the Court below in this case had been a decision on a special case on the merits, that decision would have been final. Now it is true that this is only an interlocutory matter and not a special case involving the whole matters in dispute, and it must be admitted that there is nothing in the Act of 1872, or any other Act, which in terms makes the decision of the Common Pleas final on any matter other than a special case. But it would indeed be a strange anomaly that the decision of the Common Pleas should be final on the merits, and that on some trifling interlocutory matter an appeal should lie to the Court of Appeal and thence to the House of Lords. It is contended, therefore, that s. 19 of the Judicature Act, 1873, which gives an appeal from any judgment or order of the High Court, was not intended to apply to decisions on interlocutory matters arising in municipal election petitions, although such matters are not within the exceptions expressly referred to by the section.

Ridley, for the mayor. There is jurisdiction to entertain the appeal. The matter here in question has not strictly anything to do with the election petition at all. It is entirely preliminary to it; being merely a question whether or no, as a fact, the mayor was the returning officer. There is, therefore, no anomaly in such a matter being appealable. But, even if there were, s. 19 of the Judicature Act is express, and the present case does not come within the exceptions therein referred to. Nor does s. 20 of the Appellate Jurisdiction Act, 1876, help the petitioner, for there is nothing in any Act of Parliament making the decision of the Common Pleas in a municipal election petition final except upon a special case, which this is not.

But, further, the Court below were not sitting as the Common Pleas Division, that is to say, in discharge of duties specially assigned to that Division, but merely as members of the High Court in discharge of duties belonging to the High Court generally. For rule 44 of the General Rules made under the Corrupt Practices (Municipal Elections) Act, 1872, provides that "All interlocutory questions and matters . . . shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Corrupt Practices (Municipal Elections) Act, 1872, as a judge at chambers in the ordinary proceedings of the superior Courts, and such questions and matters shall be heard and disposed of then by any judge at chambers." That rule seems to put interlocutory matters arising in municipal election petitions on the same footing as similar proceedings in ordinary actions.

LORD SELBORNE, L.C. The Judicature Act, which was passed after the Corrupt Practices Municipal Elections Act, 1872, transfers to the High Court the special jurisdiction which the last-mentioned Act had conferred upon the Court of Common Pleas. And by the 19th section of the Judicature Act an appeal is given from every judgment or order of the High Court subject to the provisions of that Act. If the matter which is now before the Court could be shewn to come within the exceptions there referred to, or within s. 20 of the Appellate Jurisdiction Act, 1876, then there would be no appeal to this Court, but it cannot be shewn to

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come within them. I should, therefore, be of opinion that we were entitled to hear this appeal, even if I thought that the matter in question was one which before the Judicature Act would have belonged to the special jurisdiction of the Common Pleas. But it is unnecessary to go that length, for under rule 44 of the General Rules (1) to which we have been referred, such a matter as this might be brought before any judge at chambers, not necessarily a judge of the Common Pleas. I am of opinion that under that order interlocutory matters are now to be dealt with, subject to the same consequences as to appeal or otherwise, as if they had belonged to the ordinary jurisdiction of the Court. We must hear this appeal.

BAGGALLAY, L.J., concurred.

BRETT, L.J. If this had been a decision of the Common Pleas Division on a special case under 35 & 36 Vict. c. 50, s. 15, subs. 6, we should not have been entitled to hear this appeal. If this had been a decision of the Common Pleas Division on any matter arising in an election petition properly begun, or if it had been a decision on any matter which could only have been brought before an election judge as such, I should have doubted whether there was an appeal. But it is not; it is a matter brought, before the election petition has begun, to a judge of the High Court. The appeal must be heard.

Ridley. First, the alderman of the West Ward who published the name of the successful candidate was the returning officer, not the mayor. This was a ward election, and by 5 & 6 Wm. 4, c. 76, s. 43, the alderman is made the presiding officer at a ward election. And the law in that respect has never been altered. Sect. 8 of 22 Vict. c. 35 recognises the alderman as the presiding officer in a ward, when it provides that the mayor or alderman, as

(1) Rule 44 (of General Rules made under the Corrupt Practices Municipal Elections Act, 1872). All interlocutory questions and matters, except as to the sufficiency of the security, shall be heard and disposed of before a judge, who shall have the same control over the proceedings under the Corrupt Practices Municipal Elections Act, 1872, as a judge at chambers in the ordinary proceedings of the superior Courts, and such questions and matters shall be heard and disposed of then by any judge at chambers.

the case may be, shall publish the list of the names of the persons elected; that section means that the alderman is to publish the names in a ward, the mayor in a borough not divided into wards. And this section is expressly kept in force by 38 & 39 Vict. c. 40. But in a municipal election (though there is in strictness no return), it is this act of publishing the names of the successful candidates which is equivalent to the return in a parliamentary election. Until the publication of the names, even in cases in which there is no contest, the election is not complete. If then it is the alderman who has, in the case of a ward, to do that which is equivalent to the return, he is the returning officer at a ward election.

The mere fact that by s. 20, subs. 3, of the Ballot Act the mayor is required to discharge certain duties, which in the case of a parliamentary election have to be discharged by the returning officer, does not ipso facto make him a returning officer. It was never intended that there should be more than one returning officer at one election.

Secondly, there is no such complaint of the mayor's conduct as justifies the petitioner in joining him as a respondent. There is no allegation of mala fides, and s. 13 of 35 & 36 Vict. c. 60 (1) was intended to refer only to cases of misconduct.

Gainsford Bruce. The mayor was the returning officer within the meaning of 35 & 36 Vict. c. 60, s. 13, subs. 6. The term "returning officer" is defined by s. 20 of the Ballot Act (2) to be in the case of a municipal election the mayor or other officer who presides at such an election. Here the mayor presided at the election. Where two candidates only are nominated, and the mayor disqualifies one of them on the ground of the insufficiency of his nomination paper, the election of the other is complete the moment that that one is disqualified, for by s. 8 of 22 Vict. c. 35 if the number of persons nominated be the same as the number to be elected such persons shall be deemed to be elected. Where there is no contest, the party nominating the candidate is the

(1) 35 & 36 Vict. c. 60, s. 13, subs. 6: Where a petition complains of the conduct of a returning officer, he shall be deemed to be a respondent.

(2) 35 & 36 Vict. c. 33, s. 20, subs. 1: The term "returning officer" shall mean the mayor or other officer who, under the law relating to municipal elections, presides at such elections.

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elector: *Reg.* v. *Parkinson.* (1) The fact that in such a case the mayor or alderman, as the case may be, is under the last-mentioned section to publish the list of the persons so elected, shews that the legislature treated the nomination and not the publication as the act of election.

But even if the allowance of the objection to the nomination paper is not the whole election, it is at all events part of the election, and the definition of returning officer in the Ballot Act is wide enough to apply to any person who presides at any part of an election.

With regard to the objection that there is here no complaint of any misconduct on the part of the mayor, it is sufficient to say that it has been the ordinary practice to join the mayor as respondent in such cases as the present. In *Gothard* v. *Clarke* (2), in which case the facts were precisely the same as those here, the mayor was made a respondent, although the election was a ward election, and although there was no allegation of mala fides. It was never suggested there that he had been improperly made a respondent.

LORD SELBORNE, L.C. In this case we all agree that this petition does not complain of the conduct of a returning officer within the meaning of s. 13 of the Corrupt Practices (Municipal Election) Act, 1872, even assuming that the mayor was here a returning officer. The words "complain of the conduct" must, as I read them, be taken to mean that there must be an imputation of misconduct. As at present advised, I am inclined to doubt whether any act on the part of a returning officer, which did not fall within the list of offences enumerated in s. 11 of the Ballot Act, could be treated as misconduct, so as to render him liable to be made a respondent in a municipal election petition; but it is unnecessary here to determine that point, for of one thing I am perfectly clear—that an erroneous decision upon the validity of a nomination paper given bonâ fide by a mayor, whether he be returning officer or not, is not misconduct, and that a complaint of such decision as erroneous is not a complaint of his conduct.

Moreover, it is to be observed that under s. 13 it is not open to a petitioner to make him a respondent or not at his option, for

(1) Law Rep. 3 Q. B. 11. (2) 5 C. P. D. 253.

the section says that where a petition complains of the conduct of a returning officer he shall be deemed to be a respondent; that is to say, he shall be treated ipso facto as a respondent by reason of the complaint. Anything more vexatious or unreasonable than to make a man, the propriety of whose conduct is not impeached, and who is alleged merely to have decided a question of law erroneously, a respondent, for the sake of mulcting him in costs, I can hardly conceive. I am glad that I have had an opportunity of expressing my opinion on this point, an opinion in which my learned Brothers agree, as it appears that in one or two cases before this the same thing has been done, though no question of law as to its propriety was ever raised. And it seems that in the present case the point was not brought to the notice of the judges in the Court below.

We think it right also to express an opinion, as to which I am not sure that we are so entirely agreed, upon the other point which was raised. I confess that my opinion has fluctuated considerably during the course of argument, but the conclusion at which I have ultimately arrived is that the mayor in this case was not a returning officer within the meaning of the Act. By s. 43 of the Municipal Corporations Act (5 & 6 Wm. 4, c. 76) it was provided that where a borough was divided into wards the aldermen should preside at elections in their respective wards, with the same authority that the mayor would have at the borough election if the borough were not divided into wards, and should publish the list of the persons elected at such ward election. The alderman is there made primâ facie the presiding officer at a ward election. When we come to 22 Vict. c. 35, we find the same law adhered to. Sect. 8 of that Act deals with the election of councillors for any borough or ward, in four different cases: first, where the number of nominations exceeds the number of vacancies; secondly, where the number of the nominations equals that of the vacancies; thirdly, where it is less than that of the vacancies; and, fourthly, where there are no nominations at all. In the first of those cases nothing is said as to any duty which the returning officer may have to discharge. It is simply stated that the councillors to be elected shall be elected from the persons nominated. In the second and third cases it is provided that the persons nominated,

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and in the fourth the retiring councillors, shall be deemed to be elected; and in each of these three last cases the mayor or alderman, as the case may be, is to publish a list of the names of the persons so elected. That I think manifestly refers to the earlier law, and means that the duty of doing the act which is equivalent to the "return," that is to say, the publication of the list of the persons elected, is cast upon the mayor where the borough is not divided into wards, and upon the alderman where it is. When we come to the Ballot Act, 35 & 36 Vict. c. 33, we find the terms "return" and "returning officer" used for the first time in connection with municipal elections; and in s. 20 "returning officer" is defined to mean "the mayor or other officer who under the law relating to municipal elections presides at such elections." But under the previous law the alderman was the person who presided at a ward election, therefore, unless there is something in the Ballot Act or in some later Act empowering some person other than the alderman to preside at a ward election, the alderman must in the case of a ward election be the "returning officer." But I can find no such provision. It is true that by s. 20 of the Ballot Act the mayor is to provide everything, which in the case of a parliamentary election is required to be provided by the returning officer, for the purpose of a poll, such as polling booths, ballot boxes, &c., and this duty is by s. 3 of the Municipal Elections Act, 1875, extended to include the appointment of officers for taking the poll and counting the votes recorded. But I do not think that it can be inferred that the legislature in these sections intended to constitute the mayor a returning officer, merely because it imposes upon him certain of the duties which would have to be discharged by the returning officer in the case of a parliamentary election.

It is said however, and this seems to be the argument which prevailed with the learned judges in the Court below, that the term "returning officer" ought to be applied to each and every person who presides at any part of an election. But s. 20 of the Ballot Act, as I read it, refers not to the person who happens to preside at a particular election, or at some particular step or proceeding in an election, but to the person who is designated by the law as the proper person to preside. If I am right in so

reading it, then, in the case of a ward, the returning officer is the alderman and not the mayor.

But then it is further contended that in such a case as the present where there are two candidates for one vacancy, the allowance of an objection to the nomination paper of one candidate under s. 1 of 38 & 39 Vict. c. 40, amounts de facto to the election of the other; and as the person who is to decide upon the validity of such an objection is the mayor, the mayor in such a case is the person who presides at the election, and consequently is the returning officer. I, however, feel myself unable to accede to that view.

I am therefore of opinion that in the present case the mayor was not a "returning officer," and that, even if he was, the petition does not complain of his conduct within the meaning of the Corrupt Practices Municipal Elections Act, 1872. The judgment of the Common Pleas Division must be reversed.

BAGGALLAY, L.J. If I had thought it necessary to determine in this case whether or not the mayor was a returning officer, I should have liked to take time to consider the question. But it is unnecessary to decide the point; for I think that there was no such complaint of his conduct as to render him liable to be made a respondent.

BRETT, L.J. The question here is whether the mayor was properly made a respondent. The only persons who can be made respondents in a municipal election petition are the candidates, or the returning officer, in a case in which a complaint is made of his conduct. The first question then is whether, assuming that the mayor here was a returning officer, there is in this petition such a complaint of his conduct as brings him within the statute. Now, before the statute, there would have been no remedy against a returning officer for anything done by him in that capacity except by action, and no action would have lain against him except for malice or misconduct. And I am of opinion that no conduct on the part of a returning officer can now be called in aid, for the purpose of making him a respondent under the statute, which would not have been ground of action against him before

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it. But the only ground of complaint here is that the mayor gave an erroneous decision on a matter upon which he was by law compelled to decide.

The second question is whether he was a returning officer within the interpretation clause of the Ballot Act. If he was not a returning officer within the meaning of that clause, he was not a returning officer at all. It was first contended that where, in consequence of the disqualification of one of two candidates on the ground of the insufficiency of his nomination paper, there is no further contest, the act of disqualifying one is the election of the other, and that as such act is done by the mayor, the mayor presides at the election, and therefore is the returning officer. I do not, however, think that the question whether the mayor is a returning officer can be made to depend on the fact of the election being contested or not. Mr. Bruce was then driven to contend that every person who presided at any part of an election was a returning officer. But if so, then every one who presided at a polling booth would be a returning officer, which is manifestly absurd. To my mind the interpretation clause points to there being only one presiding officer at any particular election, namely, where the borough is divided into wards, the alderman, if there is one; where the borough is not divided into wards, or where, being so divided, there happens to be no alderman for the particular ward, then the mayor. Of course the mayor might be returning officer in a ward, if he happened to be also alderman for that ward. In my opinion the mayor here was not a returning officer, and consequently, even if there had been a valid complaint of his conduct, he could not have been made a respondent; but further there was no valid complaint, so that he could not have been made a respondent even if he had been a returning officer.

Appeal allowed.

Solicitors for the mayor: *Brownlow & Howe.*
Solicitors for petitioner: *Bell, Brodrick, & Gray.*

[IN THE COURT OF APPEAL.]

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(C. A.)
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BOWEN *v.* HALL AND OTHERS.

Master and Servant—Contract for Exclusive Personal Service—Action for procuring a Breach of such Contract—Damages where Injunction only claimed—21 & 22 *Vict. c.* 27, *s.* 2.

An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed.

So *held* by Lord Selborne, L.C., and Brett, L.J., affirming the decision of the majority of the judges in *Lumley* v. *Gye* (2 E. & B. 216; 22 L. J. (Q.B.) 463), Lord Coleridge, C.J., dissentient.

Where in such an action the employed was also a defendant, but as against him the plaintiff claimed only an injunction and not damages, it was held that damages might, in the discretion of the Court, be given under Lord Cairns' Act (21 & 22 Vict. c. 27), and that the jury, therefore, should be directed by the judge, in the event of a verdict for the plaintiff, to find such damages as should be awarded; first, if the Court should think it a proper case both for injunction and damages; and secondly, if the Court should think it a proper case for damages only, and not also for an injunction.

ACTION as against the defendants Hall and Fletcher for wrongfully enticing away and keeping the other defendant Pearson from the plaintiff's employment, and for wrongfully receiving and harbouring him after notice of his being the servant of the plaintiff, and as against the said defendant Pearson for unlawfully and against the will of the plaintiff departing from the service of the plaintiff. The facts, so far as necessary for this report, are these:—

The plaintiff carried on the business of brickmaker, at the Clattershall Fire Brickworks in Staffordshire, and in June, 1877, the defendant Pearson, who was a bath and brickmaker, entered into a written agreement with the plaintiff, of which the following is a copy:—

"Clattershall Fire Brickworks, Stourbridge,
"June, 18th, 1877.

"I, George Pearson, of Stamber Hill, near Stourbridge, hereby agree and undertake, for the consideration of the prices below

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named, to find all labour for the whole manufacture in a workmanlike manner of best quality white glazed bricks and baths (with exception of hooping the baths and preparing the clay mass), in such quantities as you require and when you require, and deliver any where they may be required on the above premises, the said quality to be quite equal to sample supplied and marked ———, and the said prices to be subject to the standard prices of the trade for the manufacture of the same.

"Prices of bricks, $9'' \times 4\frac{1}{2}'' \times 3''$:—

"Perfect single sides, ends or flats, in quantities up to 10,000 per week, 50*s.* per 1000.

"Perfect single sides, ends or flats, in quantities from 10,000 to 15,000 per week, 47*s.* 6*d.* per 1000.

"Perfect single sides, ends or flats, in quantities from 15,000 and upwards per week, 45*s.* per 1000.

"Perfect glazed on two surfaces, 20*s.* per 1000 extra.

" " three " 30*s.* " "

"Seconds of the above from the kiln, 25*s.* per 1000.

"Waste " " " 7*s.* 6*d.* "

"Body and glaze for single sides, ends or flats, 4*s.* per 1000.

" " two surfaces, 8*s.* per 1000.

" " three surfaces, 12*s.* per 1000.

} I also agree to find.

"Prices of baths 5 ft. 8 ins. long:—

"Perfect baths, 1*l.* each.

"Second baths, 10*s.* each.

"Waste baths, nothing.

"I also agree to find body and glaze for baths at 2*s.* each.

"I also agree to load carefully into trucks, when required, bricks at 1*s.* 6*d.* per 1000. Baths, packed, loaded, and fixed into trucks at 6*d.* each; also to do any day work when required at 5*s.* per day of nine hours.

"I also agree not to engage myself to any one else for a term of five years.

"Terms of Payment.

"Fifty per cent. of the cost of making, to be paid when the goods are in the kiln, and the remainder to be paid when the goods are delivered on the bank.

"I, Edward Bowen, do hereby agree to the foregoing conditions, also to supply clay for the manufacture of the said goods in a proper state, also to find all materials (with the exception of body and glaze) and tools, and not engage any one else for the same work for a term of five years.

(Signed) "Edward Bowen.
"George Pearson."

The plaintiff alleged that the manufacture of white-glazed bricks and baths according the said sample was a secret known to the defendant Pearson and only a few others, and that the defendant Hall, who was a manufacturer of white-glazed bricks and baths in the neighbourhood of the plaintiff, did not know of this method of manufacture which Pearson used, and that therefore the bricks and baths he manufactured were inferior to those manufactured by Pearson on account of the plaintiff. The complaint of the plaintiff, and for which this action was brought, was, that in May, 1878, the defendants Hall and Fletcher (the latter being Hall's manager) wrongfully induced Pearson, contrary to his said agreement with the plaintiff, to depart from the exclusive service of the plaintiff, and to manufacture on account of the defendant Hall glazed bricks and baths such as he had contracted to manufacture for the plaintiff.

The plaintiff claimed damages, not against all the defendants, but against only the two defendants Hall and Fletcher. He also claimed an injunction to restrain these defendants from employing the defendant Pearson to do work for them at brick-making or glazing, and he claimed an injunction to restrain the defendant Pearson from engaging himself to the defendants Hall and Fletcher until the expiration of his said contract of service with the plaintiff. An interim injunction in the terms claimed was granted by Field, J., in September, 1878, as against all the defendants.

The action was tried before Manisty, J., at the Staffordshire summer assizes of 1879, when that learned judge held that there was no evidence to enable the plaintiff to maintain his action against the defendants Hall and Fletcher, and he therefore directed a verdict to be entered for those defendants, and as regarded the defendant Pearson, the learned judge was of opinion that, as that

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defendant had not acted nor threatened to act contrary to the interim injunction, there was nothing to justify making such injunction perpetual. The plaintiff afterwards applied for and obtained a rule nisi against all the defendants for a new trial. The Queen's Bench Division made such rule absolute as against the defendants Hall and Fletcher, but it discharged the rule as to the defendant Pearson. The defendants Hall and Fletcher appealed to this Court against the order for a new trial, and there was a cross appeal by the plaintiff against the order discharging the rule as to the defendant Pearson.

Nov. 3, 1880. *Jelf, Q.C.* (*J. O. Griffits, Q.C.*, with him), for the defendants Hall and Fletcher.

A. T. Lawrence, for the defendant Pearson.

H. Matthews, Q.C., and *Anstie*, for the plaintiff.

During the argument the Court expressed themselves to be satisfied that there was evidence to go to the jury as against all the defendants. An unsuccessful attempt was made by counsel for the defendants to distinguish the present case from that of *Lumley* v. *Gye* (1), on the ground that there was nothing in the terms of the contract between the plaintiff and Pearson to require the personal services of the latter. On the part of the plaintiff it was contended that there existed between Pearson and the plaintiff the strict relationship of master and servant, but that if not, then the case came within the authority of *Lumley* v. *Gye*. (1) It became necessary therefore to determine whether the judgment of the majority of the judges who decided *Lumley* v. *Gye* (1), or that of the dissenting judge (Coleridge, J.) was to be supported by a Court of Appeal. On this point, the Court took time to consider its judgment, and counsel in the meanwhile were to be at liberty to furnish the Court with a reference to any further authority bearing on the decision in that case. (2)

Cur. adv. vult.

(1) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

(2) The following is a list of the authorities with which the Court was afterwards furnished, viz.: *Evans* v. *Walton* (Law Rep. 2 C. P. 615); *Cattle* v. *Stockton Waterworks Company* (Law Rep. 10 Q. B. 453); *Haskins* v. *Royster* (16 Amer. Rep. 780); *Burgess* v. *Carpenter* (16 Amer. Rep. 643); *Bixby* v. *Dunlap* (22 Amer. Rep. 475) and note at the end of that case; *Bryan* v. *Slate* (44 Georgia, 328); and *Walter* v. *Cronin* (107 Mass. 555).

Feb. 5. BRETT, L.J. The Lord Chancellor agrees with me in the judgment I am about to read, and it is to be taken therefore as the judgment of the Lord Chancellor as well as of myself.

In this case, we were of opinion at the hearing, that the contract was one for personal service, though not one which established strictly for all purposes the relation of master and servant between the plaintiff and Pearson. We were of opinion that there was evidence to justify a finding that Pearson had been induced by the defendants to break his contract of service, that he had broken it, and had thereby, in fact, caused some injury to the plaintiff. We were of opinion that the act of the defendants was done with knowledge of the contract between the plaintiff and Pearson, was done in order to obtain an advantage for one of the defendants at the expense of the plaintiff, was done from a wrong motive, and would therefore justify a finding that it was done in that sense maliciously. There remained nevertheless the question, whether there was any evidence to be left to the jury against the defendants Hall and Fletcher, it being objected that Pearson was not a servant of the plaintiff. The case was accurately within the authority of the case of *Lumley* v. *Gye*. (1) If that case was rightly decided, the objection in this case failed. The only question then which we took time to consider was whether the decision of the majority of the judges in that case should be supported in a Court of Error. That case was so elaborately discussed by the learned judges who took part in it, that little more can be said about it, than whether, after careful consideration, one agrees rather with the judgments of the majority, or with the most careful, learned, and able judgment of Mr. Justice Coleridge. The decision of the majority will be seen, on a careful consideration of their judgments, to have been founded upon two chains of reasoning. First, that wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. This is the proposition to be deduced from the case of *Ashby* v. *White*. (2) If these conditions are satisfied, the action does not the less lie

(1) 2 E. & B. 216; 22 L. J. (Q.B.) 463. (2) 1 Sm. L. C. 8th ed. p. 264.

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because the natural and probable consequence of the act complained of is an act done by a third person: or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him. It has been said that the law implies that the act of the third party, being one which he has free will and power to do or not to do, is his own wilful act, and therefore is not the natural or probable result of the defendants' act. In many cases that may be so, but if the law is so to imply in every case, it will be an implication contrary to manifest truth and fact. It has been said that if the act of the third person is a breach of duty or contract by him, or is an act which it is illegal for him to do, the law will not recognise that it is a natural or probable consequence of the defendant's act. Again, if that were so held in all cases, the law would in some refuse to recognise what is manifestly true in fact. If the judgment of Lord Ellenborough in *Vicars* v. *Wilcocks* (1) requires this doctrine for its support, it is in our opinion wrong.

We are of opinion that the propositions deduced above from *Ashby* v. *White* (2) are correct. If they be applied to such a case as *Lumley* v. *Gye* (3), the question is whether all the conditions are by such a case fulfilled. The first is that the act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract, may not be wrongful in law or fact as in the second case put by Coleridge, J. (4) But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact. The act complained of in such a case as *Lumley* v. *Gye* (3), and which is complained of in the present case, is therefore, because malicious, wrongful. That act is a persuasion by the defendant of a third

(1) 8 East, 1; 2 Sm. L. C. 8th ed. p. 554.

(2) 1 Sm. L. C. 8th ed. p. 264.

(3) 2 E. & B. 216; 22 L. J. (Q.B.) 463. 17 Jun 847

(4) 2 E. & B. at p. 247. 17 Jun 854

person to break a contract existing between such third person and the plaintiff. It cannot be maintained that it is not a natural and probable consequence of that act of persuasion that the third person will break his contract. It is not only the natural and probable consequence, but by the terms of the proposition which involves the success of the persuasion, it is the actual consequence. Unless there be some technical doctrine to oblige one to say so, it seems impossible to say correctly, in point of fact, that the breach of contract is too remote a consequence of the act of the defendants. The technical objections alluded to above have been suggested as the consequences of the judgment in *Vicars* v. *Wilcocks*. (1) But that judgment when so used or relied on seems to us to be disapproved in the opinions given in the House of Lords in *Lynch* v. *Knight* (2), and seems to us when so used to be unreasonable. In the case of *Lumley* v. *Gye* (3), and in the present case, the third condition is fulfilled, namely, that the act of the defendant caused an injury to the plaintiff, unless again it can be said correctly that the injury is too remote from the cause. But that raises again the same question as has been just dismissed. It is not too remote if the injury is the natural and probable consequence of the alleged cause. That is stated in all the opinions in *Lynch* v. *Knight*. (2) The injury is in such a case in law as well as in fact a natural and probable consequence of the cause, because it is in fact the consequence of the cause, and there is no technical rule against the truth being recognised. It follows that in *Lumley* v. *Gye* (3), and in the present case all the conditions necessary to maintain an action on the case are fulfilled.

Another chain of reasoning was relied on by the majority in *Lumley* v. *Gye* (3), and powerfully combated by Coleridge, J. It was said that the contract in question was within the principle of the Statute of Labourers, that is to say, that the same evil was produced by the same means, and that as the statute made such means when employed in the case of master and servant, strictly so called, wrongful, the common law ought to treat similar means employed with regard to parties standing in a similar relation as

(1) 8 East, 1; 2 Sm. L. C. 8th ed. p. 554. (2) 9 H. L. C. 577.
(3) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

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also wrongful. If, in order to support *Lumley* v. *Gye* (1), it had been necessary to adopt this proposition, we should have much doubted, to say the least. The reasoning of Coleridge, J., upon the second head of his judgment seems to us to be as nearly as possible, if not quite, conclusive. But we think it is not necessary to base the support of the case upon this latter proposition. We think the case is better supported upon the first and larger doctrine. And we are therefore of opinion that the judgment of the Queen's Bench Division was correct, and that the principal appeal must be dismissed.

LORD SELBORNE, L.C. I have now to add the conclusion to which this Court has unanimously come with regard to the cross-appeal by the plaintiff against the defendant Pearson, who succeeded before the Queen's Bench Division in getting the rule for a new trial discharged or refused as to himself, while it was made absolute as to the other defendants.

Pearson was the workman, who, having a special knowledge or skill in the glazing of bricks, which gave a peculiar and exceptional value to his services, contracted with the plaintiff to work for him exclusively if required so to do, during a certain period of time (the plaintiff being reciprocally bound to employ no other person in the same kind of work during the same period), and was afterwards induced by the other defendants to break that contract. The relief asked against him in the action was injunction; an interim injunction was granted before the trial; and the case went down for trial against all the defendants at the same time and upon the same issues of fact. The effect of leaving the verdict to stand in Pearson's favour would be to entitle him to judgment in the action, which cannot be right if his contract with the plaintiff was broken in the manner alleged; and if upon the evidence given at the trial that question of fact could properly be now determined in Pearson's favour, it is impossible that upon the same evidence it could also be right to order a new trial as against the other defendants.

We think, therefore, that the plaintiff's appeal must be allowed, and that there ought to be a new trial as to all the defendants.

(1) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

But as, when the proper time comes to give final judgment, the consequences of a verdict for the plaintiff will not necessarily be the same as to Pearson, and as to the other defendants, we think that the judge at the trial ought to give such directions to the jury as will enable the Court, if the plaintiff should succeed, to deal with the particular case of this defendant as may be just. For this purpose, they ought to be directed in the event of a verdict for the plaintiff, to find specially the amount of damages which they think ought to be awarded against Pearson, first, in the event of the Court thinking his case a proper one both for an injunction and for damages; and, secondly, in the event of the Court thinking it a proper case for damages only and not also for an injunction. (See Lord Cairns' Act (21 & 22 Vict. c. 27), s. 2, and the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 2, sub-s. 6; and s. 76.)

The cases of *Hills* v. *Croll* (1), *Dietrichsen* v. *Cabburn* (2), and *Lumley* v. *Wagner* (3), and the authorities in equity as to covenants in restraint of trade within certain limits of time or place, may possibly require to be considered, before the case as to Pearson, (in the event of a verdict being found against him), is finally disposed of.

LORD COLERIDGE, C.J. In this case as far as regards the defendants Hall and Fletcher I am sorry to be obliged to differ from the Lord Chancellor and from my Brother Brett. The facts are undisputed, and I understand that all the members of the Court are agreed that the relation of master and servant did not, in the strict sense of the word, exist between the plaintiff and the workman whom the defendants induced to break his contract. That being so, the point is neatly raised whether the opinion of the majority of the judges or the opinion of the dissentient judge in the case of *Lumley* v. *Gye* (4) should prevail in a Court which is not bound by the decision in that case. I am of opinion that as we are not bound by it we ought to overrule it.

I believe if it is not admitted, at least it is the fact, that *Lumley*

(1) 2 Phill. 60; 1 D. M. & G. 627, n.
(2) 2 Phill. 52.
(3) 1 D. M. & G. 604, 627.
(4) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

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v. *Gye* (1) stands alone. Cases more or less analogous to it are, no doubt, cited in the judgments of the judges relied upon as authorities by the majority, but, in my opinion, distinguished successfully by the dissentient judge. Since its decision I cannot find that its authority has ever been so acknowledged as to be followed in any decided case which has found its way into the Reports. From its nature it cannot be a very common form of action, and though no doubt it is quite fair to say that this may reasonably account for the bareness of the Reports, it ought also in fairness to take away any weight from the circumstance that the case of *Lumley* v. *Gye* (1) has stood so many years in the books without being in terms questioned or overruled. Unfavourable observations have been made upon it; and at least in some text-books, when it is treated as an authority, it is so treated with the qualification of a "semble." Further, it has certainly not had the unanimous assent of the profession. The three judges who decided it, and my two colleagues here are no doubt lawyers entitled to the highest respect; but there have been great lawyers who are well-known to have thought that it was wrongly decided. I may mention in particular Willes, J., no doubt the counsel who argued unsuccessfully in the case, but one of the greatest jurists of this or any other time.

This state of things, I conceive, leaves me free to express here what has always been my own opinion, viz., that an action does not and ought not to lie against a third person for maliciously and injuriously enticing and procuring another to break a contract, in a case where the relation of master and servant in the strict sense does not exist. I do not propose to state at length my reasons for this opinion. I could only recite the cases and re-state the arguments of Sir John Coleridge in *Lumley* v. *Gye*. (1) I agree with my Brother Brett that the conflicting views are stated as well as they can be stated by the judges who respectively entertained them in that case; and that there is really no more to be said about it. The question is with which view do you agree, and I have said I differ from the majority.

Only one independent observation occurs to me to make. It is I believe admitted that if a man maliciously endeavours to per-

(1) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

suade another to break a contract, but fails in his endeavour, the malicious motive is not in itself a cause of action. It is, I believe, also admitted, except by Sir William Erle, whom, I think, no one has ever followed, that if a man endeavours to persuade another to break his contract and succeeds in his endeavour, yet if he does this without what the law calls "malice," the damage which results, however great, is not in itself a cause of action; I mean, of course, a cause of action against him. But if the damage which is not in itself actionable be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion, but I am reminded of the analogies of libel and conspiracy, in both which, it is said, that malice makes that same thing actionable which without it would not be so. I venture to think that in this there is a fallacy.

In the instance of libel there is not even an apparent parallel, except in cases of primâ facie privilege. A statement in itself defamatory, made deliberately and intentionally, is, I apprehend, a ground of action, however pure and even exalted may be the motive of him who makes it. The case of privilege is an exception to the general law. A statement that is defamatory and untrue, and which may do irreparable damage, is yet protected under certain conditions, on the ground that it is better for the general good that individuals should occasionally suffer than that freedom of communication between persons in certain relations should be in any way impeded. But the freedom of communication which it is desirous to protect is honest and kindly freedom. It is not expedient that liberty should be made the cloke of maliciousness, and in such a case the general law applies. It is not, I think, accurate to say that the malice makes the statement actionable. Deliberate and intentional defamation is always actionable, and the law implies that a man means what he does, save that under peculiar and exceptional circumstances the law will not make the implication which it makes in all others. So, too, in conspiracy. The gist of the civil action, as of the criminal offence, is the act of conspiracy by two or more minds to bring about certain ends by certain means. It is true that each separate conspirator might not in some instances be actionable nor indictable for attempting to do, or even for doing, with the utmost malice what he becomes

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actionable or indictable for conspiring to do with others. But here, too, I conceive that from the act of conspiring to bring about the unlawful end, or to use the unlawful means, the law implies that malice, which is necessary in law to ground the action, or support the indictment. If, therefore, the suggested analogies be accurately looked at, I think, with all deference, they turn out to be no analogies at all. I do not know, except in the case of *Lumley* v. *Gye* (1), that it has ever been held that the same person for doing the same thing under the same circumstances with the same result is actionable or not actionable according to whether his inward motive was selfish or unselfish for what he did. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice; judges are not very fit for them, and juries are very unfit. I think, therefore, that *Lumley* v. *Gye* (1) should be overruled, and that this action as against the defendants Hall and Fletcher is not maintainable. As to the other defendant Pearson I agree with the rest of the Court.

Appeal of defendants Hall and Fletcher dismissed; cross-appeal of plaintiff as to defendant Pearson allowed.

Solicitors for plaintiff: *Smiles & Co.*
Solicitors for defendants: *Brownlow & Howe.*

(1) 2 E. & B. 216; 22 L. J. (Q.B.) 463.

[IN THE COURT OF APPEAL.]

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Jan. 15.

(C. A.)
C. P. D.

HEATH AND ANOTHER *v.* PUGH.

Limitation, Statutes of (3 & 4 *Wm.* 4, *c.* 27, *and* 1 *Vict. c.* 28)—*Mortgage—Order of Foreclosure Absolute—Judicature Act*, 1873—*Ejectment.*

The effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial title to the mortgaged land for the first time in the mortgagee; so that an action, brought within twenty years next after the order of foreclosure, by the mortgagee to recover possession of such land, was held, since the Judicature Act, 1873, to be not barred by the Statutes of Limitations (3 & 4 Wm. 4, c. 27, and 1 Vict. c. 28), although more than twenty years had elapsed since the legal estate in the land had been conveyed to the mortgagee, and since the last payment of principal or interest secured by the mortgage.

Affirmed by House of Lords

ACTION to recover possession of lands named Northwood, in the county of Radnor.

On the 24th of November, 1856, by a mortgage deed of that date, Thomas King Stephens conveyed, inter alia, the lands the subject of this action, to the plaintiff Heath, and one William Swain Crealock, in fee by way of mortgage to secure the repayment with interest of 7700*l.*, which was lent to the said T. K. Stephens out of the trust funds of a marriage settlement, dated the 24th of February, 1816, of which the plaintiff Heath and the said W. S. Crealock were trustees.

In 1859 Stephens sold part of the mortgaged lands to various purchasers, and, inter alia, he sold the lands claimed in this action to the defendant. The sale was with the knowledge and connivance of Crealock, but without the knowledge of Heath, and also without disclosing to the defendant the existence of the mortgage, and the lands so sold were conveyed to the defendant on the 14th of February, 1859, by an indenture of that date, and the defendant thereupon entered and took possession of such lands.

On the 2nd of September, 1870, Heath was induced by the fraud of Crealock to execute a deed of re-conveyance re-conveying the lands to Stephens (who, Heath heard for the first time, had sold part of the mortgaged lands) in order, as represented to Heath, that on payment of the purchase-money to the trustees,

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he, Stephens, might convey the lands to the defendant. Crealock, to whom Heath sent such deed of re-conveyance, shortly afterwards absconded, having appropriated the whole of the purchase-money paid by the defendant for the mortgaged lands which he had so bought.

Heath filed a bill in the Court of Chancery on the 29th of September, 1870, against, amongst others, the defendant and Stephens, for redemption or foreclosure; and on the 10th of December, 1873, Bacon, V.C., made an order by which it was, amongst other things, declared that the deed of re-conveyance was a fraud upon Heath, and ought to be delivered up to be cancelled; that the mortgage debt of 7700*l.* remained a charge upon the lands which had been so sold as aforesaid, including the lands claimed in this action; and that an account should be taken of what was due for the principal, interest and costs under the mortgage, and that such amount should be paid by Stephens, and that in default by him or the purchasers, including the defendant, to pay such amount, Heath should be entitled to realize his security, and that the lands should be sold, and the defendant deliver the title-deeds in his possession to the purchaser.

There was an appeal from this decree of Bacon, V.C., to the Court of Appeal in Chancery, and that Court on the 10th of November, 1874, affirmed the decree, but varied it in so far as it directed a sale of the lands, and that the defendant should deliver up the title-deeds, and the Court of Appeal ordered that, upon failure of Stephens and the defendant to pay the principal and interest, they should stand foreclosed from all equity of redemption in the premises. The decision of the Court of Appeal is reported in *Heath* v. *Crealock*. (1)

The usual accounts of principal and interest due under the mortgage were subsequently taken pursuant to the decree, but neither Stephens nor the defendant paid the sum found to be due, and accordingly by orders of the High Court in the Chancery Division of the 6th of March, 1877, and the 6th of September, 1877, Stephens and the defendant were foreclosed of and from all equity of redemption of and to the said lands.

Afterwards, on the 20th of July, 1878, by an order of the Master

(1) Law Rep. 10 Ch. 22.

of the Rolls in the matter of the trusts of the settlement of the 24th of February, 1816, and of the Trustee Act, 1850, and 15 & 16 Vict. c. 55, and 22 & 23 Vict. c. 35, the plaintiff Nelson was appointed a new trustee of the settlement in substitution of Crealock, then out of the jurisdiction of the Court, and in addition to the plaintiff Heath, the continuing trustee, and by the same order it was ordered that the lands (including the lands the subject of this action) which were conveyed by the mortgage deed of the 24th of November, 1856, to Heath and Crealock should vest in the plaintiffs jointly for the estate therein previously vested in Heath and Crealock, upon the trusts of the settlement.

The present action was commenced on the 18th of October, 1878, and was brought not only against the defendant, but also against William Cadmore, his tenant, who was in possession by himself of the lands, but no point was made of this either in the Common Pleas Division or in the Court of Appeal, and the action was treated as one against the defendant only. In the statement of claim after stating the said suit in Chancery which was brought by Heath on the 29th of September, 1870, it was stated that by virtue of three orders of foreclosure made in the suit dated the 10th of November, 1874, the 6th of March, 1877, and 6th of September, 1877, and by virtue of the indenture of the 24th of November, 1856, the lands mentioned in the writ became and were subject to the trusts of the indenture of settlement of the 24th of February, 1816, and that by virtue of the premises or otherwise the plaintiffs were seised in fee-simple and entitled to possession of the lands.

The cause was tried before Denman, J., in Middlesex at the Trinity sittings, 1879, when, at the conclusion of the plaintiffs' case, evidence was given to shew that Stephens was in possession of the lands subsequently to the mortgage, and it was then contended, on behalf of the defendant, that the Statute of Limitations was a bar to the plaintiffs' claim, by reason of the mortgagees and the plaintiffs having been out of possession since the 24th of November, 1856, the date of the mortgage. There was no satisfactory evidence of payment on account of principal or interest due on the mortgage, nor of any acknowledgment in

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writing of the mortgage by Stephens, the mortgagor, within twenty years of the action; but the learned judge directed the verdict and judgment to be entered for the plaintiffs, on the ground that the order of foreclosure prevented the statute being a bar to the action.

Subsequently, a rule nisi having been obtained by the defendant for a new trial, cause was shewn in the Common Pleas Division, by *Day, Q.C.*, and *Muir Mackenzie*, for the plaintiffs, *Cohen, Q.C.*, and *Trevelyan*, for the defendant, and the following judgments were delivered:

LORD COLERIDGE, C.J. This is a case where trustees held land in trust, which was conveyed in the year 1859 fraudulently to the defendant, and conveyed to him, without any notice or knowledge of the fraud, for a valuable and full consideration: the action is an action of ejectment by one of those trustees, and another who has been substituted for a fraudulent trustee, against the bonâ fide purchaser for value of the land. The action was tried before my Brother Denman, and the course that it took, as I understand, was this: there had been certain proceedings in the Court of Chancery before the Judicature Acts, for the purpose of foreclosing the mortgage against the now defendant, and those proceedings went on, and finally, in the month of March, 1877, the Chancery Division simply made a foreclosure decree nisi, which was made absolute in September, 1877, to foreclose that mortgage. In 1877 the title of the now plaintiffs, so far as it existed at all, so far as it depended upon the foreclosure suit, was complete, but the foreclosure decree did not affect the possession of the land, and the defendant was in possession of the land, of which he had remained in possession from 1859, and out of the possession of which at all events the plaintiffs or those who represent them had been from 1856, and during that time from 1856 down to 1877 the Statute of Limitations had been running, and the defendant remaining in possession as the bonâ fide purchaser for value, having got the land and having paid the consideration, simply stood upon his rights and remained in possession. The foreclosure suit did not and could not turn him out. Something was necessary besides the foreclosure suit to

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turn him out of this possession, and after the foreclosure suit the writ of ejectment in the present action was issued. By the time the ejectment was issued the twenty years had run, and the defendant said, "Notwithstanding the foreclosure decree, and irrespective of that altogether, the statute has been running. The foreclosure decree could not suspend the running of the statute in any way. Your ejectment has not been issued until after I have a title by statute, and I am entitled to succeed." That, in my opinion, and I believe it to be that of my learned Brother, was the law and the truth of the case; but of course it was open to the plaintiffs to meet the title by statute by any evidence which would destroy the title by statute; and as payment of interest under the mortgage would have destroyed the mortgagor's title by statute, some sort of evidence at the trial, very small and imperfect evidence, was attempted to be given of payment of interest to destroy the title by statute, which it would have done if it had existed. My learned Brother who tried the case was of opinion that the foreclosure suit had some effect upon the possession of the land—that it had settled the question, as he said, between the parties, and had in effect, for that must have been his view, so far revested the possession of the property in the plaintiffs that it had stopped the operation of the statute, and that irrespective of the operation of the statute the plaintiffs had in some way acquired a title to the land by the effect of the foreclosure decree, and he being prepared to hold in that way the plaintiffs acquiesced in that, and did not take the opinion of the jury upon the question of the payment of interest, and were content to stand upon the judgment of the learned judge.

Now in the state of the pleadings and the evidence that then existed, I am of opinion that there was nothing to go to the jury, and that Mr. Cohen was perfectly right in submitting at the end of the plaintiffs' case that the plaintiffs ought to be nonsuited, and I am of opinion that is what the learned judge ought to have done. I think so for reasons which I will give in a moment, and especially for this reason, that the only evidence given to destroy the operation or effect of the title by statute was evidence, which I think Mr. Day in the then state of things was quite right in not taking the opinion of the jury upon. He had no other evidence

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of that kind, and I think, considering he had no other, he was quite right as a matter of discretion in not taking the opinion of the jury upon what appears from my Brother's note to have been mere hearsay. It was evidence which the judge would have said they must not regard. If I may say so, no mistake of conduct in the least degree was made by him, but the result is that from that time, from the position in which his clients were, there was no evidence to meet the case the defendant presented, namely, that there was a title by statute which the plaintiffs could by no means meet. There therefore ought to have been judgment of nonsuit.

That being the state of the case, what is to be done now? It is plain in my judgment that at the most only a new trial could be ordered, in which some evidence of payment of interest under the mortgage to take the matter out the operation of the statute could be given, and that in my opinion could only be given upon the terms of the payment of all the costs and expenses of the first trial by the plaintiffs, because the defendant has not been in the wrong. The defendant has simply stood upon his title, as he had a perfect right to do, and the plaintiffs, in my judgment, have done nothing to disturb that title. Therefore, anything they ask for must be at their own expense, nor indeed do I understand Mr. Day and Mr. Mackenzie to differ at all from that view. If the thing is to be granted at all, it should be granted upon those terms, and I would frankly say that in an ordinary case, and if this defendant had not been a bonâ fide purchaser for value without notice or suggested knowledge of any kind of fraud, I should have been rather inclined to take that course; but I cannot put out of my consideration that he is a bonâ fide purchaser for value who has held for twenty years, who has held without notice, and it is not even suggested that he had any suspicion of anything being wrong; he has paid his money for the land honestly, and the question is, is he entitled to retain it? I agree that in this case of two innocent persons one must suffer, and it seems to me it is our duty to regard the matter with strict legal impartiality, and where there are two innocent persons one of whom must suffer, we must leave those persons to their legal rights and not favour one side more than the other. On one side there is a cestui que trust who has been defrauded by a fraudulent trustee,

on the other side there is a perfectly honest man who has given his money for land which he has held for twenty years; it seems to me there is nothing to be said in disfavour or in favour of either of them. Then how does the matter stand? The present state of things has been brought about—I say not by whose fault in the slightest degree, that is not for me, and I do not know enough about it to express an opinion, but—the present state of things has been brought about by a curious misapprehension of the state of the law, going back for many years past on the part of those who advised the plaintiffs, and it seems to me, if of two innocent persons one must suffer, to be reasonable at least that the persons whose advisers have advised them ill, who have misconstrued their remedy, who have not been aware apparently of the ordinary rules of the Court of Equity, that is the plaintiffs, whose mischief has been brought upon them in that way, must be the persons to suffer. We have had it from the authority of a person thoroughly conversant with the practice of Courts of Equity, and I am surprised to hear anybody was unaware of it, that a foreclosure suit did not affect possession, and that a mortgagee had a right to pursue concurrent remedies, and if he pleased before the statute had run, to issue a writ of ejectment, that would have saved the operation of the statute, and any person who had taken the advice of a competent equity counsel upon the whole matter would have learnt that. Probably the equity counsel had only to advise upon the foreclosure suit, and this question about the running of the statute was never presented to his mind, but that is not the fault of the defendant; that is not in one sense the fault of the plaintiffs, but it is the fault of those who advised the plaintiffs, and where two persons are equally innocent, why should we do anything to favour one side rather than the other, one side having done all that is right, and the other side not having taken any of the plain legal remedies that were open to them to take? Then the foreclosure suit had no such operation as has been suggested. The writ of ejectment might have been issued in plenty of time to save the operation of the statute. The effect of the foreclosure suit was misconceived, and the writ of ejectment was forgotten or neglected, or deliberately abstained from by those who represented the plaintiffs, and this result has followed. I confess it seems to me that under those

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circumstances we ought not to interfere, but whatever legal rights the plaintiffs have got we do not interfere with. They have them, let them pursue them in any way they like. If they think by going to the Chancery Division they can get anything under their foreclosure decree, let them go; we do not interfere in any way, but why should we do anything to assist them in a state of things which has been brought about by the mistake of those who advised them in the manner I have described? I think therefore, upon these grounds which I have endeavoured to make plain, that the judgment pronounced at the trial should be reversed, and judgment should be entered for the defendant.

LINDLEY, J. I am of the same opinion, and I will give my reasons for arriving at that opinion as clearly as I can, considering the somewhat complicated nature of the transaction.

The first question to which I will address myself is, what are the rights of a mortgagee as against a mortgagor in possession? Those rights are first of all to sue upon the covenant for the payment of the money, secondly, to foreclose, and thirdly, to eject. If the mortgagee forecloses, that foreclosure merely prevents the mortgagor from redeeming after the time fixed for the exercise of his right, in that respect the decree for foreclosure does not in any way touch the possession; the decree for redemption does, because the legal estate is then in the defendant, and the mortgagor upon redeeming is entitled to an order, and to have the property conveyed to him; but a foreclosure decree does not affect possession at all, and the reason is that the mortgagee having the legal estate can bring ejectment if he wants possession. It does not follow that he wants possession, but if he wants possession he can get it because he has the legal estate. That is the position of an ordinary mortgagee where the mortgagor is in possession.

Now, in consequence of a fraud practised in 1870, Heath and Crealock re-leased the estate to Stephens, and so long as the deed existed, of course they could not eject. That would be an answer to their legal title. The plaintiff Heath therefore would have to get rid of that, and to eject until he got rid of that deed would be idle. He therefore very properly filed a bill to set aside that

conveyance. That suit came on before Bacon, V.C. He took the view, which the Court of Appeal affirmed, that the plaintiff was entitled to have the conveyance set aside, and was entitled to enforce the mortgage in the Court of Equity. The Vice-Chancellor went a little further, and he directed the sale of the property, and ordered the defendant to give up the title-deeds which he had got. The Court of Appeal thought that was going too far, and they would not go that length as against a bonâ fide purchaser without notice, and therefore they discharged so much of the Vice-Chancellor's decree as ordered a sale and delivery up of the deeds, and gave the plaintiff the ordinary decree for foreclosure instead. The practical effect of that was this, that if the defendant did not choose to exercise his right of redeeming within the time limited, he would be for ever prevented from so redeeming it, but it did not in any way touch the question of possession, it did not give the plaintiff in equity any greater right to get possession than he had before. It remained just where it was, and the consequence was that it became necessary for the present plaintiffs, the mortgagees out of possession, to consider how they could get possession. They seem to have been under the impression that they could get it for the mere asking, and that the foreclosure suit and proceedings in equity entitled them to it as a matter of course without any trouble. That seems to have been their impression, but it appears to me to have been an erroneous impression. If they had issued a writ of ejectment the moment that conveyance of 1870 was set aside, they would have saved the statute for they would not according to the facts. If they were late then, they are, à fortiori, too late now. If they were suing out of time then, they would be suing out of time now, and it so happens they did not bring an action to recover possession, they did not bring an action of ejectment until October, 1878, when they had been out of possession a little more than twenty years.

Now, that being the state of things, they bring their action. The defendant does not plead the statute, he is not bound to do so according to the new rule. He puts in a defence according to the general form which the rule entitles him to do, but the plaintiffs must have known perfectly well that they had been out

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of possession all this time, and unless they were under some misapprehension as to the foreclosure orders, they must have known every defence is open to a defendant as against anybody who seeks to turn him out. They must have foreseen there would have been this difficulty about the statute. They bring the case on for trial, but when the case comes on for trial there is no way of getting out of the statute, no acknowledgment is put in, no evidence of payment is put in, because, although Mr. Heath is called and says interest was paid, when he is cross-examined, he does not know who paid it, and his evidence is worth nothing. It comes to that. There is an end to the plaintiffs' case. What is their case? Simply nothing; it is a failure. Then it appears to me the plaintiffs ought to have been nonsuited. The defence to the action was perfect. Then comes the question whether it would be just and right to set aside a judgment of nonsuit, or to give the plaintiffs an opportunity of re-trying the action, and that is the question, which it appears to me, is the important one, and the only difficult one. Now, in respect of that it was said the Court exercises the discretion which it has in cases of this kind as against a bonâ fide purchaser for value. Why should it interfere at all? Whatever can be made against him by law must be made against him, and he must meet it as best he can. Why should the Court exercise its discretion adversely to him? It is said that the plaintiffs are as innocent as the defendant, but to say that somebody else is as innocent as he is, is not to my mind a sufficient reason. But the matter by no means stands there, because it does appear to me there has been no surprise, mistake, or accident in the sense in which those words are used in the order which deals with these judgments of nonsuit, there can have been no surprise in the statute being set up, and persons in the position of the plaintiffs must have foreseen and have known that they had been out of possession for more than twenty years. They must have known that. There was no surprise in that, there was no mistake in that, and there was no accident. As I understand, it is put in this way, that the plaintiffs did not expect to be met by the statute; they rather thought they would have, at least, they rather thought they might have, to fight upon some question of identity of parcels. I cannot see how they could have done

that, unless there was something done or said to mislead them in that respect. It seems to me that they must have foreseen that there was this statute behind, unless, which is possible, they misconceived the effect of the Chancery proceedings altogether, in which case of course there would be surprise, but not such a surprise it appears to me as to entitle them to a new trial even upon the terms suggested of paying the costs. Therefore, if this had been an ordinary case, the right course would have been to grant a new trial; but I do not think that we ought to make an order as against a bonâ fide purchaser for value, and I am disposed to think nothing ought to be done. Upon those grounds, treating this as a special case in that respect, I am of opinion that the rule ought to be made absolute.

In accordance with this decision the judgment for the plaintiffs was discharged, and entered for the defendant.

The plaintiffs applied by way of appeal to this Court to have such judgment reversed, or for a new trial.

Charles, Q.C., and *Muir Mackenzie*, for the plaintiffs. The plaintiffs were taken by surprise at the trial, and were not prepared to prove payment of interest by the mortgagor, but if a new trial were granted they could prove such payment by the answer of Stephens in the Chancery suit (Stephens being now dead). Some of these payments were before the conveyance to the defendant and some were afterwards.

[LORD SELBORNE, L.C. Admissions made by Stephens in 1858 would be good evidence against the defendant, but admissions made in the Chancery suit after the conveyance to the defendant would be very different.]

There is no other evidence of payment. With respect to the judgment of the Common Pleas Division it proceeded on an erroneous supposition as to the effect of a foreclosure decree. The judges there treated the foreclosure decree as merely barring the mortgagor of his equity of redemption, and as not giving the mortgagee any right to the land. That is not correct,—the effect of such decree is to give the mortgagee an absolute title to the land, and when made in a suit commenced (as the Chancery suit

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was in this case) within the prescribed time after the right of action accrued, it stops the Statute of Limitations from running: *Wrixon* v. *Vize* (1). The possession to enable advantage to be taken of the statute must be an adverse one to that of the person who claims it in the action: *Board* v. *Board* (2); and there is no such adverse possession by the mortgagor, and the defendant cannot be in any better position than the mortgagor from whom he purchased.

Cohen, Q.C., and *Trevelyan*, for the defendant. A foreclosure decree is only in personam depriving the mortgagor of his personal right to redeem: *Paget* v. *Ede*. (3)

[LORD SELBORNE, L.C. The defendant was only a purchaser of the equity of redemption. Then when once the case is reduced to that of a mortgagee and mortgagor, the ordinary consequences follow: *Colyer* v. *Finch* (4).]

The decree of foreclosure does not affect the legal right to the land, and where the mortgagee is out of possession, and must therefore bring ejectment, he must do so within twenty years from the time of the execution of the mortgage deed: *Doe* d. *Roylance* v. *Lightfoot*. (5) When the statute once began to run it continued to go on, so that the time had elapsed when this action was commenced. Next the vesting order in the new trustee was not the proper one; it was made under the wrong section of the Trustee Act, 1850 (13 & 14 Vict. c. 60), by which it professed to vest the lands in the new trustee jointly with the plaintiff Heath, whereas Crealock had then no land vested in him, but only a right of entry, and the order should have been made, therefore, under the section which enables a contingent right, which by the interpretation clause includes a right of entry, to be vested.

[BRETT, L.J. The effect of this would only be to make one of the plaintiffs a bad plaintiff, and he can be taken out of the proceedings.]

Charles, Q.C., in reply.

[LORD SELBORNE, L.C. We do not require to hear you as to the last point.]

(1) 3 D. & War. 104.
(2) Law Rep. 9 Q. B. 48.
(3) Law Rep. 18 Eq. 118.
(4) 19 Beav. 508; 5 H. L. 920.
(5) 8 M. & W. 553; 11 L. J. (N.S.) (Ex.) 151.

The plaintiff Heath acquired a new title by the foreclosure decree, and the foreclosure suit, as pointed out by Lord St. Leonards in *Wrixon* v. *Vize* (1), is a suit to recover land.

Cur. adv. vult.

Jan. 15. The judgment of the Court (Lord Selborne, L.C., Baggallay and Brett, L.JJ.) was delivered by

LORD SELBORNE, L.C. This is an action of ejectment commenced on the 18th of October, 1878, by the plaintiffs, who are trustees under a certain indenture of settlement. The only defence was the Statute of Limitations, 3 & 4 Wm. 4, c. 27. At the trial a verdict was found for the plaintiffs under the direction of Denman, J., on the ground that certain decrees and orders of the Court of Chancery, which I shall presently mention, were an answer to the statute. But a Court of the Common Pleas Division, on motion to set aside this verdict, differed from that view of the law and ordered judgment to be entered for the defendant. The appeal is from that order.

We disposed, during or at the close of the argument, of two points which were raised, the one by the plaintiffs, the other by the defendant. The plaintiffs contended that they ought, if necessary, to have the opportunity of going before another jury for the purpose of proving the payment of interest by one Stephens, from whom the defendant derived his title, by means of declarations of Stephens made after he had parted with his estate in the land. Those declarations we thought inadmissible against the defendant. On the other hand it was contended (but as we thought, without sufficient ground) that an order of the Master of the Rolls vesting the land in one of the plaintiffs as a new trustee jointly with the other plaintiff, who was an original trustee, was void, and that the plaintiffs must therefore fail. There remains for determination the main question whether, upon the evidence at the trial, the plaintiffs were entitled to judgment. (I shall speak throughout, for convenience, as if both the plaintiffs had been the original trustees.)

The facts which we regard as material are these:—1, A legal mortgage of land to the plaintiffs dated the 24th of November,

(1) 3 D. & War. 104.

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1856, to secure 7700*l.* and interest; 2, a subsequent conveyance of the equity of redemption by the mortgagor (Stephens) to the defendant in 1859; 3, bill filed by the plaintiffs against Stephens and the defendant for redemption or foreclosure in 1870; 4, decree in 1874 against both defendants to the suit for the usual accounts, and for redemption or foreclosure; 5, subsequent proceedings according to the usual course of the Court of Chancery, ending in an order of foreclosure absolute against the present defendant on the 6th of September, 1877. There was no proof of payment at any time of any sum on account of principal or interest upon the mortgage, nor of any acknowledgment in writing of the plaintiffs' title by the defendant.

It will be seen that we do not regard, as at all material, the fact that the defendant purchased from Stephens for valuable consideration without notice of the plaintiffs' mortgage. It was determined conclusively in the Chancery suit, that what he took by his conveyance from Stephens was only an equity of redemption; and that being the case, the right of redemption and the liability to be foreclosed were the necessary and correlative incidents of his title: *Colyer* v. *Finch.* (1) The Court of Appeal in the Chancery suit did indeed refuse, on principles applicable to a purchaser for valuable consideration without notice, to take from the defendant the title-deeds, or to make against him any form of order depending upon the mere exercise of discretion, which would interfere with the continuance (for such time as it might otherwise continue) of his possession. But that Court made the common decree for redemption or foreclosure, to be worked out in the usual manner, with all the effects and consequences which such a decree would have had in the case of Stephens himself or of any other person who was not a purchaser for value without notice. The present question is, what those effects and consequences are?

No authority was quoted for the decision of the Common Pleas Division, but the authority of the judges who pronounced it (one of them especially familiar with equity) is itself great. Being unable to concur in it, we are led by our high respect for every opinion of those learned judges to state our reasons at greater length than we might otherwise have thought necessary.

(1) 19 Beav. 508; Law Rep. 5 H. L. 920.

The law of mortgage is a familiar and very important branch of English jurisprudence, which, when the statute 3 & 4 Wm. 4, c. 27, was passed, was well understood on both sides of Westminster Hall. Several sections of that statute, and the whole of the later Act, 1 Vict. c. 28, expressly relate to it. By 7 Geo. 2, c. 21, the Courts of Common Law had been enabled and directed, in any action for recovery of a mortgage debt, or for the possession of mortgaged land (unless proceedings were at the same time depending in equity), to give effect upon the defendant's application to his right of redemption and re-conveyance, in much the same way as a Court of Equity would have done. The possession of the mortgaged land by the mortgagor, during the subsistence of the security, and while the mortgagee did not choose to take possession, was held (at law as well as in equity) to be "at the will," or by the "sufferance," or "permission" of the mortgagee, under a "tacit agreement" which the mortgagee might determine at his pleasure. It was of the nature of the transaction that the mortgagor should continue in possession. His possession was rightful and not by wrong. He was entitled to the rents and profits as long as he remained in possession; mesne profits accrued due and received prior to action or demand could not be recovered from him by the mortgagee. The former statute of limitations (21 Jac. 1, c. 16) did not, under the circumstances of such a possession by the mortgagor, run against the mortgagee: *Keech* v. *Hall* (1); *Moss* v. *Gallimore* (2); *Partridge* v. *Bere* (3); *Hall* v. *Doe* d. *Surtees* (4); *Leman* v. *Newnham* (5); *Doe* v. *Williams*. (6) It may be added, that by the Judicature Act of 1873 (s. 25), a mortgagor, entitled for the time being to the possession of land, as to which no notice of his intention to take possession has been given by the mortgagee, is recognised as having a right in respect of which it was thought fit that he should be enabled to sue for possession, and for the recovery of rents and profits, in his own name.

In equity (where this branch of our jurisprudence originated) the conveyance of the legal estate to a mortgagee was regarded as

(1) 1 Dougl. 21.
(2) 1 Dougl. 279.
(3) 5 B. & A. 604.
(4) 5 B. & A. 687.
(5) 1 Ves. Sen. 51.
(6) 5 Ad. & E. 291.

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nothing more than a security for a debt. During the subsistence of the equity of redemption, the debt, together with this benefit of the security, passed to the executor by a will of personal estate, and the legal title to the land did not pass by a general devise of all the mortgagee's real estate in a will duly attested, because it was not regarded in equity as any part of that estate. As to the equity of redemption, it is sufficient to quote Lord Hardwicke's words in the leading case of *Casborne* v. *Scarfe*. (1) "An equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and, therefore, cannot be considered as a mere right only; but such an estate whereof there may be a seisin. The person, therefore, entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets." . . . "The interest in the land must be somewhere and cannot be in abeyance, but it is not in the mortgagee, and, therefore, must remain in the mortgagor. A. devises his estate and afterwards makes a mortgage in fee; though this is a total revocation in law, yet in this Court it is a revocation pro tanto only," (and see *Blake* v. *Foster*. (2))

This being the position of the title, as long as the mortgage is redeemable, the effect of an order of foreclosure absolute is to vest the ownership of, and the beneficial title to, the land, for the first time, in the person who previously was a mere incumbrancer. The equitable estate of the mortgagor is then forfeited and transferred to the mortgagee. It is transferred as effectually as if it had been conveyed or re-leased. "A foreclosure" (said Lord Hardwicke) "is considered as a new purchase of the land." "The mortgage being foreclosed" (said Sir Wm. Grant) "the estate became absolutely his." "By the order made in the foreclosure suit" (said Sir Lancelot Shadwell) "he became the absolute owner:" *Casborne* v. *Scarfe* (1); *Silberschildt* v. *Schiott* (4); *Le Gros* v. *Cockerell*. (5) The title obtained by such "new purchase" did not, before the Wills Act of 1838, pass by general words in a will, duly attested

(1) 1 Atk. 603; 2 Tu. L. C. 1055, 5th ed.

(2) 2 Ball & Beatty, 402, 403.

(4) 2 V. & B. 49.

(5) 5 Sim. 389.

to pass real estate, made before the foreclosure and not afterwards republished; it did pass, if such will were republished after foreclosure, or if a new will in like general terms were then made.

It follows from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which, by a title newly accrued, has for the first time become his own property; and that it can make no difference whether the title which he previously had as a mere incumbrancer was, or was not, protected by a legal estate. The possession which he now claims, and the right by virtue of which he seeks to recover it, are substantially different from the possession which he might before have claimed, and from the right by virtue of which he might have claimed it. "There can be no two things" (said Lord Manners in *Blake* v. *Foster* (1)) "more distinct or opposite than possession as mortgagee and possession as owner of the estate; nor can anything be more hazardous or inconvenient than the possession of a mortgagee, the manner in which he is called to account is most rigorous and severe." One consequence of a decision, that a mortgagee who obtains a foreclosure absolute is not safe against the Statute of Limitations under circumstances like those of the present case, would be to make it necessary for him (under such circumstances) to take possession while still mortgagee, or, if it were resisted, to bring ejectment for that purpose, on pain of forfeiting his title and of becoming liable, if a trustee (as the present plaintiffs are), for a loss by breach of trust of the whole value of the estate.

The present plaintiffs had, thirteen months before the commencement of this action, obtained against the present defendant an order of foreclosure absolute, having that effect in equity which has been described. Their action was brought upon the title so obtained. Their statement of claim contains these averments: 1, "that by virtue of three orders of foreclosure made in the suit (of which the dates are stated) and by virtue of the indenture of the 24th of November, 1856, the lands and premises mentioned in the writ became and still are subject to the trusts of the indenture of settlement of the 24th of February, 1816;" and, 2,

(1) 2 Ball & Beatty, at p. 403.

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that "by virtue of the premises the plaintiffs are now seised in fee-simple and entitled to possession of the lands and premises mentioned in the writ." The plaintiffs represent, for the purpose of this action, the whole equitable title and rights of their cestuis que trust.

It is not in our opinion necessary to determine how far and under what circumstances, before the Judicature Acts, a court of law would have taken notice of the effect of such orders of foreclosure, as vesting for the first time the equitable title in the person who previously as mortgagee had the legal estate. Under ss. 24 and 25 of the Judicature Act of 1873 the High Court of Justice is bound to do so, and to give full effect to the equitable right; so that (if there would previously have been any conflict on this point between law and equity) the rule of equity must now prevail. We may, however, state our agreement with what was long before said by Lord St. Leonards, in *Wrixon* v. *Vize* (1); which is, we think, fully applicable in principle to the present case. "A suit in this court" (i.e., the Court of Chancery) "properly instituted will prevent time from running; and a court of law, now that the same rule is prescribed by the statute for both courts, should I conceive act upon that principle. At all events, this court will protect its own jurisdiction; and will not permit the suitor to be evicted at law who had an equitable right to sue for the land, and had filed his bill within the limit allowed, and duly pursued his remedy."

It is impossible, without disregarding the equitable title, to hold that the right of the plaintiffs to the land in the present case was barred by the Statute of Limitations when this action was brought. All the sections of the Statute of Limitations which especially relate to mortgages, and also the later Act 1 Vict. c. 28, may be laid entirely out of the case; this action was not barred by any of them. The Act 1 Vict. c. 28 does not itself create a bar in any case in which it had not been already created by the Act which it explains; it only declares (in conformity, and with manifest reference, to the rule which had before prevailed in equity) that nothing in that Act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal or

(1) 3 D. & War. 123.

interest from the person entitled to the equity of redemption within twenty years before the commencement of any action or suit. The question therefore depends upon the 2nd and 3rd, when considered in connection with the 24th and 34th, sections of 3 & 4 Wm. 4, c. 27. Time (if it ever ran under the 2nd and 3rd sections) must have begun to run either from the date of the mortgage deed (24th of November, 1856), or from the day fixed for redemption on payment of the principal money secured by the deed;—not more certainly than a year afterwards. It is obvious, that the time having that commencement could only run against the mortgage title then vested in the plaintiffs. So far as that title was concerned, their proper remedy was equitable; and that remedy was duly pursued within the period limited by s. 24. After the commencement of the suit, which ended in the foreclosure, it was no longer possible that the statute should run against that title. The new title by foreclosure first accrued upon and by reason of the forfeiture of the defendant's equity of redemption, within the meaning of the last clause of the 3rd section of the statute; i.e., at the date of the order for foreclosure absolute. Lord St. Leonards thought that this last clause was the only part of the 3rd section applicable to mortgages: *Wrixon* v. *Vize* (1), and if applicable (as he thought it) to the lapse by non-payment ad diem of the first right of redemption expressly reserved by the deed, it cannot be less applicable (when the party who forecloses has the legal estate) to the later and more conclusive forfeiture by which the equity of redemption is finally barred. The legal estate under such circumstances supports the beneficial title. A plaintiff who obtains a foreclosure cannot be in a worse position, because when he became in equity the owner of the land he had already a legal estate, down to that time unaccompanied by ownership. If authority were needed, these conclusions appear to be supported by that of Lord St. Leonards in the case before him, already referred to: *Wrixon* v. *Vize*. (2) He thought, notwithstanding the doubts expressed by Patteson, J., in *Doe* v. *Williams* (3)—doubts which, speaking here for myself, I should have shared if the point had been open—

(1) 3 D. & War. 117. (2) 3 D. & War. 116–120.
(3) 5 Ad. & E. 291.

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that, although the conveyance was by way of mortgage, the right to bring an action, or make an entry, clearly fell within the 2nd section; but he also thought that a foreclosure suit was a suit "to recover the land" within the meaning of that statute and of 1 Vict. c. 28. "The right," he said, "to file a bill of foreclosure, whether the plaintiffs' mortgage be a legal or an equitable one, falls within the 24th section of the statute 3 & 4 Wm. 4, c. 27 and 1 Vict. c. 28; and the time is governed by the legal right of the party to bring an action, or, if he have not the legal estate, by the right which he would have had if his estate had been a legal instead of an equitable one." And "it cannot be said that the suit is not to recover the land as it is already vested in him, for this expression would be strictly accurate where the mortgage is of the equitable estate; and, where the mortgage is a legal one, yet the suit is in effect to recover or obtain the equity of redemption, which is, in the view of equity, an actual estate:" *Wrixon* v. *Vize.* (1)

Lord St. Leonards therefore held, that a mortgagee, by filing a bill for foreclosure within the time limited by s. 24, did all that was necessary to prevent the bar of the statute, and that when he obtained the usual order for foreclosure absolute he "recovered the land" within the meaning of the statute. If so, how could the mortgagor be entitled, a day or a year afterwards, to refuse to give up possession on the ground that the right was barred by the statute? The 34th section says that, at the determination of the period limited by the Act to any person for bringing any action or suit, *all right and title of such person to the land,* for the recovery whereof such action or suit might have been brought within such period, *shall be extinguished.* If the period limited for bringing an action for the recovery of possession of land under a legal conveyance by way of mortgage could be held to have determined by the lapse of twenty years from the accruer of such right of action, during the pendency of a foreclosure suit commenced in due time, we see no escape from the conclusion that the right and title of the mortgagee to the land would be thenceforth extinguished; that instead of the equitable estate of the mortgagor being forfeited to the mortgagee, the whole right, title, estate, and

(1) 3 D. & War. 119, 120.

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interest of the mortgagee would be transferred to the mortgagor; and that instead of an order for foreclosure absolute being afterwards made, all further proceedings in the foreclosure suit ought immediately thereupon to be stayed.

To state such a consequence, (if it logically follows, as we think it does), is of course to disprove the premises. The defendant who is barred by the order absolute is estopped from denying that the right and title thereby adjudged to the plaintiffs became vested in them by virtue of that order; or, that the plaintiffs thereupon became entitled in a right distinct from any which they previously had to that possession which he, the defendant, had, down to that time, held, not by wrong, but under and by virtue of the same right and title which is so transferred. The plaintiffs are not barred by the statute, because after the institution of the Chancery suit it ceased to run against them; and by the present action they are seeking to enforce that right of possession which was for the first time given to them, indefeasibly, by the decree absolute for foreclosure in that suit.

We are, for these reasons, of opinion that the appeal must be allowed, and that judgment must be entered for the plaintiffs in this action.

Appeal allowed.

Solicitors for plaintiffs: *Budd, Son, & Brodie.*
Solicitors for defendant: *Coombe & Wainwright.*

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Q. B. D.

[CROWN CASE RESERVED.]

REG. *v.* WILLSHIRE.

Bigamy—Duration of Life, presumption of—Conflicting presumptions.

In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive:—

Held, by the Court (Lord Coleridge, C.J., Lindley, Hawkins, Lopes, and Bowen, JJ.), that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C.

CASE stated by Sir W. T. Charley, Q.C., the Common Serjeant of the City of London.

The prisoner was tried before me at the Session of the Central Criminal Court, held on the 31st of January last.

The indictment charged that he married Charlotte Georgina Lavers on the 7th of September, 1879, and that he feloniously married Edith Maria Miller on the 23rd of September, 1880, his wife Charlotte Georgina being then alive. The indictment also charged that the prisoner had been previously convicted of felony at the Central Criminal Court in the month of June, 1868.

A marriage between the prisoner and Charlotte Georgina Lavers on the 7th of September, 1879, and a subsequent marriage between the prisoner and Edith Maria Miller on the 23rd of September, 1880, were clearly proved. It was also proved that at the time of the prisoner's marriage to Edith Maria Miller his alleged wife Charlotte Georgina was alive.

When the case for the prosecution was concluded, the prisoner's counsel asked the counsel for the prosecution to call a witness whose name appeared on the indictment, but the counsel for the prosecution declined to call him. The prisoner's counsel then himself called the witness, who produced a certificate of the previous conviction of the prisoner for felony in June, 1868. The indictment for this felony and caption were also produced in court

by the proper officer at the instance of the prisoner's counsel. The indictment was for bigamy, and alleged that the prisoner married Ellen Earle on the 31st of March, 1864, and feloniously married Ada Mary Susan Leslie on the 22nd of April, 1868, his wife Ellen Earle being then alive.

The prisoner's counsel contended that he had proved that the prisoner had a wife living in June, 1868, and that in order to convict the prisoner on the present indictment, it was incumbent on the prosecution to shew that this wife was dead on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers. Counsel for the prosecution contended that there being no presumption of law that Ellen Earle was alive on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers (the presumption, if any, after seven years, being, indeed, the other way), and a primâ facie case of bigamy having been clearly proved by the prosecution on the present indictment, the onus was thrown upon the prisoner of shewing that Ellen Earle was alive on the 7th of September, 1879, when the prisoner married Charlotte Georgina Lavers.

I held that the burden of proof was on the prisoner. No evidence was offered by the prisoner's counsel that Ellen Earle was alive on the 7th of September, 1879. There was no evidence that the alleged marriage of the prisoner with Ellen Earle was declared void or dissolved by any Court of competent jurisdiction.

The prisoner was found guilty. He was then arraigned on that part of the indictment which charged the previous conviction of felony in June, 1868, and pleaded guilty. I respited judgment. The prisoner remains in gaol.

The question which I reserve for the opinion of the Court for the consideration of Crown Cases Reserved is: "Whether the prisoner has been properly convicted of feloniously marrying Edith Maria Miller, his wife Charlotte Georgina being then alive."

Ribton, for the prisoner. It is for the prosecution to prove that Charlotte Lavers was the lawful wife of the prisoner, and to satisfy the jury of the death of the prisoner's first wife Ellen Earle. This they failed to do.

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[HAWKINS, J. Why should it be presumed that the prisoner committed bigamy in marrying Charlotte Lavers? Is not innocence to be presumed?]

Not where, as here, there is legal evidence to the contrary. It is proved that Ellen Earle was alive in June, 1868, and there being no evidence of her death she must be taken to be still alive. By the criminal law a prisoner must be acquitted if all the facts necessary to constitute the offence are not proved by the prosecution. There was nothing in this case to alter the general rule and cast the burden upon the prisoner of proving his innocence of the offence charged.

Poland (*Montagu Williams*, with him), for the prosecution. There was a clear primâ facie case made out by the prosecution. The prisoner described himself, when he married Charlotte Lavers, as a "bachelor," and by his act furnished evidence against himself that he was then free to marry. A primâ facie case thus being made, it was for the prisoner to displace it by evidence. The prisoner only shewed that in 1868 his first wife Ellen Earle was living, a fact which is equally consistent with her being alive or dead in 1879. Indeed the statute as to bigamy (24 & 25 Vict. c. 100, s. 57) sanctions a presumption that a person not heard of for seven years is dead. (1)

The marriage with Charlotte Lavers cannot be held invalid merely because eleven years before the time of such marriage the prisoner had a wife alive.

[LORD COLERIDGE, C.J. The learned Common Serjeant did not leave the question to the jury as to whether Ellen Earle was alive or dead at the time of the marriage with Charlotte Lavers.

HAWKINS, J. Ought not the direction to the jury to have been that it was proved that Ellen Earle was alive in 1868, and that there was no further evidence upon the point except that the prisoner had in 1879 presented himself to be married as one free to marry, which was, in effect, a representation by him that he was legally free so to do; and then would it not have been for the jury to find whether Ellen Earle had died before the marriage with Charlotte Lavers?]

(1) *Reg.* v. *Lumley*, Law Rep. 1 C. C. R. 196, 199.

It is submitted that, in substance, that was the course adopted. The facts were all left to the jury, with a direction that under the circumstances the burden of proving that Ellen Earle was alive in 1879 was on her husband, the prisoner.

[LORD COLERIDGE also called attention to *Doe* d. *Knight* v. *Nepean*. (1)]

LORD COLERIDGE, C.J. I am of opinion that this conviction cannot be sustained. The facts are short and are clearly stated in the case. There was a marriage, admitted to be valid, contracted by the prisoner in 1864; there was evidence that the woman then married to the prisoner was alive in 1868. In 1879, the prisoner went through the ceremony of marriage with another woman. It is said, and I think rightly, that there is a presumption in favour of the validity of this latter marriage, but the prisoner shewed that there was a valid marriage in 1864, and that the woman he then married was alive in 1868. He thus set up the existence of a life in 1868, which, in the absence of any evidence to the contrary will be presumed to have continued to 1879. It is urged, in effect, that the presumption in favour of innocence, a presumption which goes to establish the validity of the marriage of 1879, rebuts the presumption in favour of the duration of life. It is sufficient to raise a question of fact for the jury to determine. It was for the jury to decide whether the man told and acted a falsehood for the purpose of marrying in 1879, or whether his real wife was then dead. The Common Serjeant did not leave the question to the jury, but on these conflicting presumptions held, that the burden of proof was on the prisoner, who was bound to adduce other or further evidence of the existence of his wife in 1879; thus withdrawing from the jury the determination of the fact from these conflicting presumptions. I am clearly of opinion that in this the learned common serjeant went beyond the rules of law. The prisoner was only bound to set up the life; it was for the prosecution to prove his guilt.

LINDLEY, J. I am of the same opinion. The bigamy charged was marrying Edith Miller in 1880; Charlotte Lavers, whom he

(1) 5 B. & Ad. 86; 2 M. & W. 894.

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married in 1879, being then alive. It was contended that Charlotte Lavers was not his wife; because another woman his wife was living when he married Lavers. Was such other woman then living? There was evidence both ways. This evidence was not left to the jury, consequently the conviction cannot stand.

HAWKINS, J. This case depended on a question of fact, whether Ellen Earle was alive on the 7th of September, 1879, or not. If she was alive, the prisoner was entitled to be acquitted, if she was dead, he was rightly convicted. There was proof that Ellen was alive in 1868; there was presumption that her life continued. The only evidence to the contrary was, that the prisoner presented himself as a bachelor to be married in 1879. Whether that would have satisfied the jury that his former wife was then dead was a question for them to decide, but it was not left to them for decision.

LOPES, J. The conviction cannot be sustained. There was evidence both ways upon the question of the life of Ellen Earle upon the 7th of September, 1879, which should have been left to the jury.

BOWEN, J. I am of the same opinion.

Conviction quashed.

Solicitor for prosecution: *The Solicitor to the Treasury.*

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Landlord and Tenant—Bankruptcy of Lessee after granting Sub-lease—Disclaimer by Lessee's Trustee of Lessee's Interest in Premises—Bankruptcy Act, 1869, *ss.* 23, 125.

When a lessee sub-lets and afterwards becomes bankrupt, and his trustee, under s. 23 of the Bankruptcy Act, 1869, and under an order of the Court of Bankruptcy, disclaims the lessee's interest in the premises, the lessor is entitled to eject the sub-tenant.

Lessee for a term of years by deed demised part of the premises for a shorter term, and the sub-lessee entered into possession. The lessee afterwards liquidated by arrangement under the Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the Court for leave to disclaim was given to the sub-lessee within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee:—

Held, by Mathew, J., that the lessor was entitled to recover possession.

Taylor v. *Gillott* (Law Rep. 20 Eq. 682) followed.

STATEMENT OF CLAIM.

1. The plaintiffs are the owners of 90, New Bond Street, Middlesex.

2. By lease of the 30th of December, 1870, the plaintiff Smalley demised the premises to Jones for sixty-one years from 1868, at a certain rent, with a covenant by Jones against assignment of the whole or part without Smalley's licence.

3. By lease of the 19th of May, 1871, Jones demised to Gardner, without Smalley's licence, part of the premises for twenty-one years from 1870, at a certain rent.

4. By a subsequent deed Gardner assigned to the defendant, without Smalley's licence, all his interest in the lease of the 19th of May, 1871, and the premises thereby demised, and the defendant thereupon entered and is still in possession. The plaintiffs require the production at the hearing of the lease of the 19th of May, 1871, and the assignment, and crave leave to refer to them and to the lease of the 30th of December, 1870.

5. In December, 1879, Jones filed a petition in the London Bankruptcy Court; a resolution for liquidation by arrangement was afterwards passed and registered, and a trustee appointed on the 23rd of January, 1880.

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6. On the 29th of April, 1880, the trustee applied to the Bankruptcy Court for leave to disclaim Jones' interest in 90, New Bond Street; and by an order of the Court dated the 3rd of June, 1880, leave was given to the trustee to disclaim such interest.

7. Shortly after the making of the application the defendant received notice thereof, and within a reasonable time before the 3rd of June, 1880, the defendant received notice that the application would be heard and disposed of by the Court on the 3rd of June.

8. On the 14th of July, 1880, the trustee, under and by virtue of the said order, by writing under his hand, duly disclaimed the interest of Jones in and to the premises, 90, New Bond Street, demised to Jones by the lease of the 30th of December, 1870.

9. Alternatively, the plaintiffs repeat all the above allegations, and say that shortly after the execution of the disclaimer they gave the defendant notice thereof, and of all the circumstances mentioned in the 5th, 6th, and 8th paragraphs, and required him to give them, within a reasonable time, possession of the premises assigned to him by Gardner, but the defendant refused to give up possession within a reasonable time, or at all, and the reasonable time elapsed long before this action.

Claim—1. Possession of the premises assigned to the defendant by Gardner.

2. Mesne profits from the 23rd of January, 1880, to the day of recovering possession.

Demurrer to the claim.

March 7. *Warmington*, for the defendant. A disclaimer under s. 23 of the Bankruptcy Act, 1869 (1), affects only the rights and

(1) Sect. 23. "When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable or not readily saleable by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication; and

liabilities of lessor and lessee, and of the trustee. It cannot affect legal rights created before the bankruptcy. The words "shall if the same is a lease be deemed to have been surrendered" mean that it shall be as if there had been a voluntary surrender to the lessor, who on a voluntary surrender takes subject to the rights of the sub-lessee, and can sue him upon the covenants in the sub-lease. The disclaimer here is not of the premises or the property, but only of the lessee's interest, and thus leaves untouched the rights of the sub-lessee.

Arthur Charles, Q.C. (*Moorsom*, with him), for the plaintiffs. Upon the execution of the disclaimer the plaintiffs became entitled to recover possession as from the date of the trustee's appointment.

[MATHEW, J. It sounds rather alarming to say that where a freeholder leases for building purposes, and the lessee builds and becomes bankrupt, and his trustee disclaims, the freeholder can eject all the tenants of the houses, and recover the land with all its improvements.]

In such a case the trustee should not and would not disclaim. The creditors would not allow him, because the lease would be a valuable property. If, however, the trustee desires to disclaim, any sub-lessee can, by indemnifying the trustee for the short period during which the lease is vested in him, obtain an assignment. If the sub-lessee makes application, the Court will compel the trustee to assign on these terms, and will not allow him to disclaim. This was done in the case of an equitable mortgagee

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if the same is a lease, be deemed to have been surrendered on the same date; and if the same be shares in any company, be deemed to be forfeited from that date; and if any other species of property, it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled, then in no case shall any estate or interest therein remain in the bankrupt.

"Any person interested in any disclaimed property may apply to the Court, and the Court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

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of the lease: *Ex parte Buxton, In re Müller.* (1) The expressions of James, L.J., there imply that a disclaimer would affect the equitable mortgagee; and in *Ex parte Ditton, In re Woods* (2) the Court of Appeal held that after the execution of a disclaimer by the lessee's trustee, with the leave of the Bankruptcy Court, the lessor's title to the property was complete, and the rights of an equitable mortgagee of the lease extinguished. If the defendant's contention is correct, the plaintiffs have no right to the land, for that is in the possession of the sub-lessee, nor to the rent, for that is gone with the disclaimed lease, nor to enforce the covenants, for the same reason. They could not even sue the sub-lessee upon the covenants in the sub-lease, for the assignee of a reversion can only sue when he voluntarily accepts the reversion, which is not the case here. But if they could, the covenants in the sub-lease and the rent reserved differ materially from those in the lease, and it would be very unjust to force upon the plaintiffs terms they object to and a tenant they do not want. The lessee might have taken a large premium and granted a sub-lease at a peppercorn without covenants. This question was decided in the plaintiffs' favour in *Taylor* v. *Gillott* (3), where the lessee having let a sub-tenant into possession under an agreement for a lease, liquidated, and his trustee disclaimed. The lessor having brought ejectment against the sub-tenant, Hall, V.C., refused to restrain the ejectment, or to compel the lessor to grant a lease to the sub-tenant upon the terms of the agreement, and pointed out the distinction between a disclaimer and a voluntary surrender. If the sub-lessee is injured he can prove against the estate under the last clause of s. 23 and s. 31.

Warmington, in reply. A lessor to whom a lease has been surrendered can sue the sub-lessee upon the covenants in the sub-lease: 8 & 9 Vict. c. 106, s. 9; and if he is damnified, can prove against the estate under s. 31 of the Bankruptcy Act. In *Ex parte Ditton* (2) there was no judgment of the Court. *Taylor* v. *Gillott* (3) was an attempt by a stranger to foist on the lessor a new contract. The sub-tenant should have asked for a lease on the terms of the original lease. The present defendant is in

(1) 15 Ch. D. 289. (2) 3 Ch. D. 459.

(3) Law Rep. 20 Eq. 682.

possession under a legal estate, and that gives him an advantage over the tenant in *Taylor* v. *Gillott.* (1)

Cur. adv. vult.

March 8. MATHEW, J. The question in this case turns upon the construction of the 23rd section of the Bankruptcy Act of 1869, and is, What is the effect of a disclaimer, by a trustee in bankruptcy of a lease made to a bankrupt, on the sub-leases made by him before bankruptcy of the premises contained in the original lease? Mr. Charles contended, on the authority of *Taylor* v. *Gillott* (1), that the disclaimer put an end to the lease and the sub-leases which the bankrupt had created. It seems to me that the reasoning of the Vice-Chancellor is applicable to the present case, and that the plaintiffs are entitled to rely upon the judgment as a decision in their favour. It was argued by the learned counsel for the defendant that the sub-lease here is a legal interest, while in *Taylor* v. *Gillott* (1) the subordinate interest was equitable. This, it was argued, made all the difference; but I think it makes no difference. The argument from hardship is available upon either contention; but I do not think it unreasonable to suppose that the legislature intended to solve the difficulties, occasioned by the bankruptcy of a lessee, by providing means for terminating the lease, while the Court of Bankruptcy is provided with the means of protecting the interests derived from the lessee.

Whether or not the Court of Bankruptcy has power to administer relief in this case under s. 23 I express no opinion.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Walters, Deverell, & Walters.*
Solicitor for defendant: *W. H. Herbert.*

(1) Law Rep. 20 Eq. 682.

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Jan. 29.

(C. A.)
Q. B. D.

[IN THE COURT OF APPEAL.]

THE REVEREND THOMAS PELHAM DALE'S CASE.
THE REVEREND R. W. ENRAGHT'S CASE.

Public Worship Regulation Act, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 9, 13, 16, 19—*Significavit, Power to issue, for Contempt—Requisition, Monition, and Inhibition, Form of—Absence of Statements shewing Jurisdiction—Forms given by Rules and Orders of* 1875, 1879, *of Statutory Authority—"Rules regulating Procedure" includes Forms of Proceedings—*127*th Canon not binding on Official Principal appointed by Public Worship Regulation Act,* 1874 *— Style of Judge under Public Worship Regulation Act,* 1874 *— Requirement as to place of hearing Cause—Writ de Contumace Capiendo issued in Vacation and not brought into Court—Petty Bag Act*, 12 & 13 *Vict.*, *c.* 109, *s.* 26.

A representation under the Public Worship Regulation Act, 1874, was made in July, 1878, by the churchwardens of a parish to the bishop of the diocese, complaining of the incumbent for certain illegal practices in the conduct of divine worship. The bishop and archbishop being alternate patrons of the benefice, the bishop of the diocese of E. was appointed to act in the place of such bishop and archbishop in the matter of the representation under the 16th section of the above mentioned Act. The Bishop of E. having considered the representation sent a requisition to the judge under the Public Worship Regulation Act, 1874, requiring him to hear the case in London or Westminster, or within the diocese. The requisition followed as nearly as possible the form given by the rules and orders of 1875, issued under the Public Worship Regulation Act, 1874. It did not state that a copy of the representation had been sent to the party complained of, or that the parties had been required to state whether they would submit to the directions of the bishop touching the matter of the representation, as provided for by s. 9 of the Public Worship Regulation Act, 1874. It stated, however, that the parties had not stated within the prescribed time that they were willing to submit to the directions of the bishop:—

Held, by the Queen's Bench Division, that the requisition under the 9th section of the Public Worship Regulation Act must name the limits within which, under the section, the hearing is to take place, but need not name the particular place within such limits—that the requisition made by the Bishop of E. was valid, and that the form of it was sufficient on the following grounds, first, that it sufficiently shewed by necessary implication that the parties had been required to state whether they were willing to submit to the directions of the bishop; secondly, that it was not competent to the party complained of to object to the form of the requisition to the judge if all the facts essential to the jurisdiction in truth existed; and, thirdly, that the requisition was in substantial accordance with the form given by the rules and orders. This decision was not questioned on appeal.

The judge under the Public Worship Regulation Act proceeded to hear the

matter of the above mentioned representation, and issued a monition commanding the incumbent complained of to abstain from certain practices which he pronounced unlawful. The incumbent disregarded such monition, and continued the said practices, whereupon the judge issued an inhibition inhibiting the incumbent from the performance of divine service and the exercise of the cure of souls within the diocese for three months, and thereafter until the inhibition should be relaxed. The monition issued while the rules and orders of 1875 (1 P. & D. 1) were in force, but the inhibition issued after the amended rules of 1879 (4 P. & D. 250) had come into force. In the monition the judge was styled the official principal of the Arches Court of Canterbury (he having become such official principal under the 7th section of the Act upon the resignation of the previous official principal), but except in this respect the monition exactly followed the form given by the rules and orders of 1875. The inhibition exactly followed the form given by the rules and orders of 1879 :—

Held, by the Queen's Bench Division, that, assuming an official principal of the Arches Court of Canterbury to be within the 127th of the canons of 1603, 1604, the judge under the Public Worship Regulation Act, 1874, was constituted by the 7th section of that Act upon the happening of a vacancy ex officio official principal of the Arches Court of Canterbury, without any obligation to take the oaths and subscribe the articles as required by that canon. This decision was not questioned on appeal:

Held, also, by the Queen's Bench Division, that the judge was rightly described in the monition as official principal of the Arches Court of Canterbury without setting forth how he became such official principal. This was not questioned on appeal:

Held, by the Queen's Bench Division and by the Court of Appeal, that the power given by the Public Worship Regulation Act, 1874, s. 19, to make rules and orders regulating the procedure under the Act, includes the power to make forms, and that consequently the forms given by the rules and orders of 1875 and 1879 are of statutory authority, and the monition and inhibition, whether they would have otherwise sufficiently shewn jurisdiction or not, were valid as being in accordance with the forms so given.

The incumbent disregarded the inhibition, and continued to exercise the cure of souls. The judge then issued a significavit against him for contempt. A writ de contumace capiendo was thereupon issued from the Petty Bag Office on the 29th of October, and recorded in the Queen's Bench on the following day (the Court not being then sitting), and delivered to the sheriff. Under this writ the incumbent was arrested and lodged in prison :—

Held, by the Queen's Bench Division and by the Court of Appeal, that the judge under the Public Worship Regulation Act, 1874, is not the judge of a new court constituted by the Act, but is the official principal of the old Court of Arches, and has all the old powers of that Court, including the power of signifying for contempt if his orders are disobeyed, and that as the Act does not contain any special power of enforcing an inhibition issued under it, such inhibition can be enforced by significavit under 53 Geo. 3, c. 127 :

Held, by the Queen's Bench Division, that the provisions of 5 Eliz. c. 23, s. 2, incorporated by 53 Geo. 3, c. 127, s. 1, that the writ de contumace capiendo, when brought into the Court of Queen's Bench, should there, in the presence of the justices, be opened and delivered of record to the sheriff, were impliedly

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repealed by the 26th section of the Petty Bag Act, 12 & 13 Vict. c. 109, and were not revived by the repeal of that section by 38 & 39 Vict. c. 66 and 42 & 43 Vict. c. 59; that the writ was effectual, and that the incumbent was lawfully arrested under it:

Held, on appeal, that though the Petty Bag Act authorized the issuing of the writ in vacation, it did not repeal the enactment that the writ should be opened in the Queen's Bench in the presence of the justices, and that as it had only been brought into the Crown Office at a time when the judges were not sitting, the requisitions of 53 Geo. 3, c. 127, had not been complied with, and the incumbent was entitled to be discharged from custody.

A monition commanded an incumbent, inter alia, to abstain from wearing in the administration of the Holy Communion the vestments known as an alb, a chasuble, and a biretta, and from all practices, acts, matters, and things of the same or a like nature to those thereinbefore particularly set forth, or any of them, or from unlawfully permitting the same, or any of them. The inhibition stated that the incumbent had failed to obey the monition in regard to the matters therein mentioned, and proceeded to specify various acts, most of which were expressly forbidden by the monition, and also that the incumbent had permitted his curate to wear at the Communion Service certain unlawful ecclesiastical vestments, to wit a biretta and a stole, and it inhibited him from officiating for three months, and thereafter until the inhibition should be relaxed:—

Held, that it was within the jurisdiction of the judge to decide whether the wearing a stole was not an unlawful act of the same or a like nature to those mentioned in the monition; that if he had decided wrongly the case was one for appeal, and that even if the Act gave no appeal in such a case, that was no ground for saying that the judge had exceeded his jurisdiction. A prohibition to restrain proceedings on the inhibition was therefore refused.

Whether the including among the grounds of the inhibition an act not prohibited by the monition along with acts which were so prohibited would make the inhibition invalid—*quære*.

Affirmed by House of Lords 7 App. Cas. 140 H.L.

In this case a writ of habeas corpus to bring up the body of the Rev. Thomas Pelham Dale from Holloway Gaol, had been issued under the following circumstances:—

The Rev. Thomas Pelham Dale was the Rector of the united parishes of St. Vedast, otherwise Foster and St. Michael le Querne, in the city of London, of which living the Bishop of London and the Archbishop of Canterbury were alternate patrons.

On the 12th of July, 1878, a representation was made under the Public Worship Regulation Act, 1874, by certain persons being churchwardens of the parishes of St. Vedast and St. Michael le Querne to the Bishop of London, complaining of Mr. Dale in respect of certain alleged unlawful practices in the conduct of divine worship.

In consequence of the Bishop of London and the Archbishop of

Canterbury being alternate patrons of the living, and therefore unable through interest to act in the matter of the representation, the Bishop of Exeter was appointed under her Majesty's sign manual to act in the place of the Archbishop and the Bishop of London, and of each or either of them, in all matters arising thereafter in relation to the said representation. On the 13th of September, 1878, the Bishop of Exeter issued a requisition to Lord Penzance, the judge under the Public Worship Regulation Act, in the following terms:—"Frederick, by divine permission Bishop of Exeter, acting in the place of Archibald Campbell, by divine permission Archbishop of Canterbury, to the Right Hon. James Plaisted, Baron Penzance, a judge of the Provincial Court of Canterbury, greeting. Whereas a representation has been made to the right reverend father in God, John, Lord Bishop of London, by John Clifford Serjeant, Robert George Morley, James Horwood, and George Robert Bengough, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which the Rev. Thomas Pelham Dale, clerk, rector of the united parishes of St. Vedast, otherwise Foster and St. Michael le Querne, in the city and diocese of London, is the person complained of, and such representation has been transmitted to the said archbishop: and whereas, in pursuance of the provisions of the said Act, we, Frederick, Lord Bishop of Exeter, were by an instrument bearing date the 24th day of July, 1878, under the sign manual of her most gracious Majesty Queen Victoria, appointed to act in the place of the said John, Lord Bishop of London, and the said Archibald Campbell, Lord Archbishop of Canterbury, and each or either of them, in all matters thereafter arising in relation to the said representation: and whereas the said John Clifford Serjeant, Robert George Morley, James Horwood, Robert Bengough, and Thomas Pelham Dale have not within the time prescribed by the said Act stated their willingness to submit to our direction touching the matter of the said representation, and we have signified such failure to the said archbishop: Now we, Frederick, Bishop of Exeter, acting in the place of the archbishop aforesaid, do hereby require you the judge aforesaid to hear and determine the matter of the said representation at any place in London or Westminster or within the said diocese of London as you may think fit."

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Notice of the time and place of hearing of the matters of the said representation, as also of all the subsequent proceedings after mentioned, was duly given to the Rev. Mr. Dale, but he did not appear at the hearing or at any subsequent stage of the proceedings.

The matters of the said representation were heard and determined by Lord Penzance, and he pronounced that Mr. Dale had been guilty of offences against the laws of the church in respect of certain of the matters complained of. Lord Penzance thereupon issued a monition commanding Mr. Dale to abstain from certain practices and matters therein specified. The monition, which was issued on the 21st of February, 1879, and sealed with the seal of the Arches Court of Canterbury, followed the form of monition given by the rules and orders issued under the Public Worship Regulation Act, 1874, and approved by order in council, dated the 28th of June, 1875 (1), except that instead of describing Lord Penzance as a judge of the Provincial Court of Canterbury it described him as official principal of the Arches Court of Canterbury. (2) In accordance with the form, the only preliminary matter recited in the monition was as follows: "Whereas at the hearing of the matter of a representation made by John Clifford Serjeant, &c., the churchwardens of the parishes aforesaid, in pursuance of the provisions of the Public Worship Regulation Act, 1874, in which you the said Thomas Pelham Dale are the person complained of, we did pronounce that the complainants had failed in proof of the allegations contained in the 6th paragraph, but had sufficiently proved the allegations contained in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, and 12 of the said representation, and that you had offended against the statutes, laws, constitution, and canons of the Church of England in respect of the practices, acts, matters, and things alleged in the said paragraphs, to wit," &c. The monition then commanded Mr. Dale to abstain from the matters in which he had so offended (specifying them) and from all practices, acts, matters, and things of the same or

(1) See 1 P. D. 1.

(2) In October, 1875, Sir Robert Phillimore, the then official principal of the Arches Court, resigned that office, and Lord Penzance, by virtue of the 7th section of the Public Worship Regulation Act, 1874, became official principal.

the like nature to those thereinbefore particularly set forth or any of them.

Mr. Dale disobeyed the monition, and thereupon Lord Penzance on the 19th of March, 1880, issued an inhibition against him in pursuance of the 13th section of the Public Worship Regulation Act, 1874, inhibiting him for such his disobedience from performing any service of the church or otherwise exercising the cure of souls within the diocese for three months and thereafter until the inhibition should have been duly relaxed. On the 22nd of February, 1879, the day after the issue of the monition, amended rules and orders under the Public Worship Regulation Act (1) were approved by order in council, and the inhibition, which was sealed with the seal of the Arches Court of Canterbury and described Lord Penzance as official principal of that court, followed the form given by such rules. In accordance with such form it simply set forth by way of recital, that in the matter of the representation made by John Clifford Serjeant, &c., churchwardens, &c., a monition had been issued and duly served on Mr. Dale, the tenor of the monition, and that Mr. Dale had failed to pay due obedience to the said monition in regard to certain matters specified.

The inhibition was duly served upon Mr. Dale, but he disregarded it and continued to exercise the cure of souls. Thereupon Lord Penzance issued a significavit against Mr. Dale for contempt in respect of his disobedience to the inhibition, and a writ de contumace capiendo was issued, under which Mr. Dale was arrested and imprisoned in Holloway Gaol. The writ was dated the 29th of October, 1880, and was indorsed as follows: "This writ is allowed, enrolled, and delivered of record before our Lady the Queen in the Queen's Bench Division of her High Court of Justice at Westminster, on Saturday, the 30th day of October, 1880, in the forty-fourth year of the reign of our sovereign lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, according to the form of the statute in such case made and provided.

"F. Cockburn, Crown Office."

The affidavits set forth extracts from the records of the Arches Court for the purpose of shewing that Lord Penzance, on becoming

(1) See 4 P. D. 250.

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official principal of the Arches Court upon the resignation of Sir Robert Phillimore, had not taken the oaths or subscribed the Thirty-nine Articles as required by the 127th of the canons of 1603 and 1604, and that previous officials principal had done so.

A writ of habeas corpus had been moved for and granted, and also rules nisi for a writ of certiorari to bring up and quash the requisition, monition, and inhibition, for a writ of prohibition to prohibit further proceedings, and for a writ of supersedeas to quash the allowance of the writ de contumace capiendo, on the following grounds, viz., that the process for contempt resorted to by the judge under the Public Worship Regulation Act was not open to him, the sentence of inhibition under the 13th section of the Public Worship Regulation Act being in itself a final sentence, which could not be made the foundation of further proceedings under 53 Geo. 3, c. 127: that, assuming that the process by significavit was open to the judge, the requisition, monition, and inhibition were void on the face of them: that the judge under the Public Worship Regulation Act had not complied with the necessary preliminaries to enable him to execute the office of official principal of the Arches Court of Canterbury, and, lastly, that the writ de contumace capiendo was bad on the face of it, not having been issued in compliance with the provisions of 5 Eliz. c. 23, and 53 Geo. 3, c. 127.

Upon the return to the writ of habeas corpus,

Dec. 6, 7, 8, 9, 10, *Charles, Q.C.*, *Poland*, and *W. Phillimore*, moved for the discharge of the prisoner from custody. (1)

There is no power to signify for contempt in respect of disobedience to the inhibition issued under the 13th section of the Public Worship Regulation Act. That Act creates a new jurisdiction, and the mode of enforcing obedience thereto is expressly given by the 13th section, viz., by an inhibition, which if it remains in force for more than three years renders the benefice void. The power to imprison for the purpose of enforcing obedience to the monition is not expressly given and cannot be implied.

(1) It was agreed that the rules for a supersedeas, certiorari, and prohibition should be argued at the same time.

[LORD COLERIDGE, C.J. By sect. 7 it is provided that in the event of a vacancy occurring—and such vacancy has occurred—in the office of official principal of the Arches Court of Canterbury, the judge under the Act is to become ex officio such official principal, and all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury are to be deemed to be taken in the Arches Court of Canterbury. Does not this provision clothe the judge with all the powers formerly exercised by the official principal, and among them that of signifying for contempt?]

The statute provides a special procedure with regard to certain specified matters, and proceedings under the statute must be in accordance with such procedure in whatever court they may be deemed to be. It cannot be implied that the judge in proceedings under this statute is to have the powers incidental to procedure under other statutes. Cockburn, C.J., in the case of *Hudson* v. *Tooth* (1), says: "It is not as Dean of Arches that the jurisdiction is created in the judge. It is a mere accident that the judge appointed under this statute has become Dean of Arches." It was argued in that case that Lord Penzance having become official principal could sit anywhere in the province. The decisions in that case and in *Serjeant* v. *Dale* (2) both shew that a special jurisdiction is given by the Public Worship Regulation Act, and the procedure given by that statute must be followed.

[LORD COLERIDGE, C.J. Those cases are distinguishable. There the procedure being under the Public Worship Regulation Act the hearing was at a place where the judge had no power to hear the case according to the express provisions of the Act. Here the proceedings having been correctly carried on down to inhibition, the question is whether the inhibition can be enforced as a proceeding in the Arches Court.]

If that were so, the judge as official principal could suspend or deprive in proceedings under the Public Worship Regulation Act, which cannot surely be contended. The effect of the provision that the proceedings shall be deemed to be taken in the Court of Arches is, that the judge may use the officers of the Arches Court, and the proceedings will be recorded in that court, but it cannot

(1) 3 Q. B. D. 53. (2) 2 Q. B. D. 558.

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have been meant by such words to give all the coercive jurisdiction of the official principal in proceedings under the Public Worship Regulation Act. The words of the 13th section are express that the monition is to be enforced by an inhibition under that section.

[LORD COLERIDGE, C.J. Suppose the inhibition is disobeyed ?]

While the inhibition is in force the clergyman, if he continued to officiate, would be an intruder, and he could be proceeded against for brawling under 23 & 24 Vict. c. 32. In fact, the officials principal of the provinces of Canterbury and York resigned a short time after the Public Worship Regulation Act passed, but it might have been twenty years before Lord Penzance became Dean of Arches. Could it be contended that during that period he could have signified for contempt? If not, then why is it an absurd construction of the Act to say that he cannot now? It cannot have been intended that in proceedings under the Public Worship Regulation Act the judge should or should not have the power of imprisoning for contempt, according as it might or might not happen that he had become official principal of the Arches Court through the occurrence of a vacancy. As Cockburn, C.J., said in *Hudson* v. *Tooth* (1), it is an accident that he is such official principal.

The requisition under which the judge heard the case is the foundation of the statutory jurisdiction of the judge, and in this case it was defective for several reasons.

The bishop of the diocese has by the Act a judicial duty to discharge, in deciding whether or not the representation shall be proceeded upon, and the archbishop has to require the judge to hear the case and to determine the place of hearing. These are distinct duties imposed by the Act upon different persons. It was not competent for one person to perform both, as was done in this case by the Bishop of Exeter.

Again, the archbishop is by the Act to require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster. It is contended that the meaning is that he shall name some place within those limits for the hearing. This is not done by the requisition here.

The requisition, monition, and inhibition are all bad on the

(1) 3 Q. B. D. 51.

face of them. The proceedings in this case are proceedings in pursuance of a limited statutory jurisdiction, and it is a general principle that such proceedings must shew the existence of all the circumstances which constitute conditions precedent to the exercise of the jurisdiction on the face of them.

Neither the requisition, nor the monition, nor the inhibition, shew that the representation was sent to the party complained of, nor that he was required to state whether he would submit to the directions of the bishop, in relation to the matter of the representation. It is not shewn therefore that the preliminaries existed which are required by the Act before the case could be brought within the jurisdiction of the judge.

[FIELD, J. Does not the allegation in the requisition, that the applicant had failed within the time prescribed to state his willingness to submit to the directions of the bishop, necessarily imply that he had an opportunity of so doing? The time prescribed runs from the time when the parties are required to state their willingness.]

It is submitted that it is not sufficient that a matter essential to the jurisdiction of an inferior court should appear by intendment. It must be expressly stated.

[They cited on this point *Harrison* v. *Wright* (1); *Christie* v. *Unwin* (2); *Howard* v. *Gossett* (3); *Muskett* v. *Drummond* (4); *Labalmondiere* v. *Frost* (5); Phill. Eccl. Law, 1280; *Rex* v. *Eyre* (6); *Nash's Case* (7); *Rex* v. *Blake* (8); *Rex* v. *Bayshaw.* (9)]

The monition and inhibition purported to be issued by the official principal of the Arches Court of Canterbury. It does not appear from these documents how the person so acting as official principal was entitled to issue them. The only person who could properly issue them was the judge possessing the statutory jurisdiction given by the Public Worship Regulation Act. There are no statements on the face of the monition or inhibition which shew that the person so acting as official principal

(1) 13 M. & W. 816.
(2) 11 Ad. & E. 373.
(3) 10 Q. B. 359.
(4) 10 B. & C. 153.
(5) 1 E. & E. 527.
(6) 2 Str. 1066.
(7) 4 B. & A. 295.
(8) 2 B. & Ad. 139.
(9) 7 T. R. 360.

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was the judge under the Public Worship Regulation Act, and that the events had happened upon which, by virtue of the Act, he became official principal of the Arches Court.

Again, Lord Penzance was not qualified to exercise the functions of official principal until he had taken the oath and signed the Thirty-nine Articles, as required by the 127th canon. The first part of the canon deals with matters of personal qualification, and must be taken to be repealed, so far as the official principal is concerned, by the express provisions of the Public Worship Regulation Act, but the latter part is still in force with regard to him, as it was with regard to officials principal appointed before the Act. The effect of the Act is that he is thereby in a certain event appointed official principal; but before he can execute the office he must take the oath, as he would have been bound to do if appointed before the Act.

[LORD COLERIDGE, C.J.:—What authority is there for saying that it was essential to the jurisdiction of the official principal that he should take the oath?]

The practice has been for the official principal to take it. The only case with regard to the effect of the canon is *Rex* v. *Verelst* (1), which was the case of a surrogate.

Lastly, the writ de contumace capiendo was not regularly issued in accordance with 53 Geo. 3, c. 127, s. 1, because the formalities prescribed by 5 Eliz. c. 23, s. 1, with relation to the writ de excommunicato capiendo were not complied with. It appears from the date of the writ that it was issued in vacation, and not in term time, and that it was not brought into Court and opened and allowed in the presence of the justices. The division of the legal year into terms is preserved, where they were used as a measure for determining the time at or within which any act is required to be done: Judicature Act, 1873, s. 26. The writ here was not brought into Court at all, but merely taken to the Crown Office and there indorsed by the master. The decisions are clear that this will not suffice: *Parker's Case* (2); *Rex* v. *Fowler* (3); *Rex* v. *Theed* (4); *Lucy* v. *Bishop of St. David's*. (5) In *Watson's*

(1) 3 Camp. 431.
(2) Cro. Car. 582.
(3) 1 Salk. 350.
(4) 10 Mod. 351.
(5) 7 Mod. 56.

Case (1) Holt, C.J., said "that it was necessary, as the Court was to award the writ, that it should know the cause of excommunication, and whether the matter was of ecclesiastical cognizance, and that they could not know that but by their seeing the writ in this Court."

[They also cited on this point *In re Baines* (2); *Reg.* v. *Thorogood* (3); *Reg.* v. *Jones* (4); *Rex* v. *Ricketts* (5); *Rex* v. *Hewitt* (6); *Rex* v. *Blake* (7); *Hopwood* v. *Watts.* (8)]

Sir Henry James, A.G., Sir Farrer Herschell, S.G., and *Danckwerts*, for Lord Penzance, shewed cause against the discharge of the prisoner and the rules for a certiorari and prohibition. With regard to the objection arising from Lord Penzance's not having complied with the canon, it is contended that the office of official principal is not within the canon at all; secondly, that the canon is not binding on Lord Penzance as a layman; thirdly, that Lord Penzance held his office by virtue of the Public Worship Regulation Act, and was under that Act fully qualified to execute the office of official principal without any other qualifications than those required by the Act; fourthly, that even if the canon were binding on Lord Penzance, the omission to comply with the canon did not invalidate the proceedings taken.

The canon does not expressly mention the "official principal." He is not included in the words "chancellor, commissary, or official." The official principal is a higher official than a chancellor or commissary: *Saunders* v. *Davis* (9), *Oliver* v. *Hobart.* (10)

It cannot have been intended to include him under the word "official." It is well settled that the canons do not proprio vigore bind laymen, or even the clergy so far as their temporalities are concerned: *Middleton* v. *Crofts* (11); *Marshall* v. *Bishop of Exeter.* (12) Lord Penzance is a lay judge of one of the Queen's courts, and cannot be bound by the canon: *Cawdrie's Case.* (13) It does not appear, in fact, to have been the settled practice

(1) 7 Mod. 117.
(2) 1 Cr. & P. 31.
(3) 12 Ad. & E. 183.
(4) 10 Ad. & E. 576.
(5) 6 Ad. & E. 537.
(6) 6 Ad. & E. 547.
(7) 2 B. & Ad. 139.
(8) 5 B. & Ad. 1056.
(9) 1 Addams Eccl. 291, 296.
(10) 1 Hagg. Eccl. 47; Appendix B. p. 7.
(11) 2 Atk. 650.
(12) Law Rep. 3 H. L. 17.
(13) 5 Co. Rep. 33.

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that officials principal took the oath in accordance with the canon.

The provisions of the Public Worship Regulation Act, s. 7, constitute the judge under the Act ex officio a valid official principal of the Arches Court, without the necessity for compliance with the canon.

The concluding part of the section states what the necessary qualifications are. All others are by implication excluded. It was held in *Margate Pier Co.* v. *Hannam* (1) that the acts of a justice of the peace who has not duly qualified are not absolutely void.

With regard to the objections to the requisition, it has been contended, in the first place, that the Bishop of Exeter could not be appointed to perform the duties of the Bishop of London and the archbishop. The statute provides that, if the bishop is disqualified by reason of interest, the archbishop is to act in his place. In that case the archbishop would have to perform the duty of the bishop in considering the representation, and also that imposed upon himself by the statute, viz., of appointing the place for the hearing. In like manner, if the archbishop is disqualified, the person appointed under the statute must perform the two duties.

Then with regard to the objections to the form of the requisition, monition, and inhibition. The doctrine that has been relied upon with regard to the requisition does not apply. The decisions with regard to convictions and orders of justices and other similar cases are distinguishable. The person who is called upon to obey a conviction order or other such document is entitled to have the jurisdiction shewn on the face of the document, in order that he may know whether he is legally bound to obey it. But there is no provision that the requisition is to be sent to the party complained of. It is a matter between the archbishop and the judge who is required to act. The party complained of by the representation is not directed to do anything by the requisition. He cannot therefore take this objection to the form of the requisition, if the judge is satisfied that there was jurisdiction to make it, and acts upon it. It is contended that even if it be

(1) 3 B. & A. 266.

otherwise the matter in question sufficiently appears by implication. It is objected that the requisition did not name a place for hearing. The Act does not require this. It provides that the requisition shall be to hear at any place within the diocese or province, or in London or Westminster. It is for the judge to select the place within those limits. The requisition is in the terms of the Act in this respect except that, in conformity with the forms framed under the Act, it omits the province. With regard to the monition and inhibition, they are in accordance with the forms given by the rules and orders framed under s. 19 of the Public Worship Regulation Act, and approved by Order in Council. (1) Lord Penzance is described as official principal and not as judge of the provincial Court of Canterbury, but a note to the rules of 1875 provides that, in the event of the judge becoming official principal of the Arches Court of Canterbury, the rules and orders and the forms prescribed shall be applicable, mutatis mutandis, to all cases thereafter arising, such necessary alterations in the style of the forms being made as the judge may direct. By the amended rules of the 22nd of February, 1879, the forms are altered in regard to the style of the judge. The Act gives power to make rules for regulating procedure. Forms of proceedings are matters of procedure. These forms being made in pursuance of the Act are of statutory authority. [They cited on this point *Simpson* v. *Flamank* (2); *Kite* v. *Lane* (3); *Re Peerless* (4); *Attorney-General* v. *Sillem.* (5)]

With regard to the main point, viz., whether Lord Penzance had authority to enforce the inhibition by significavit, it is submitted that even before the judge became official principal he would have had this authority. His Court was an ecclesiastical court and the cause was an ecclesiastical cause. The 53 Geo. 3, c. 127, gives the power of signifying for contempt in all causes ecclesiastical. However this may be, it is submitted that Lord Penzance clearly had the power after he became official principal of the Arches Court.

By the 7th section, as soon as a vacancy occurred in the office

(1) 1 P. D. 1; 4 P. D. 230.
(2) Law Rep. 1 P. C. 463.
(3) 1 B. & C. 101.
(4) 1 Q. B. 143.
(5) 10 H. L. C. 704.

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he became official principal, and thenceforward all proceedings are to be deemed to be taken in the Arches Court. The official principal of the Arches Court had this power of signifying for contempt in the case of proceedings under the Church Discipline Act for offences of this nature, and the legislature must have intended that there should be this power. It is true that the 13th section provides that the monition shall be enforced by inhibition. But even assuming that this excludes the power of enforcing the monition by imprisonment, which is not admitted, how is the inhibition to be enforced? It cannot possibly have been intended that the offender should be able to disregard the order of the Court for three years. If he complies with the monition at any time during the three years the benefice is not rendered void, and so he might disobey for any period short of three years without being subject to any penalty for his disobedience. If the power of enforcing the inhibition by imprisonment does not exist, there is no effectual means of enforcing it. Imprisonment in such a case is not a punishment for the offence but by way of enforcing the order of the Court. It would be an anomaly that a Court should not have any effectual mode of enforcing its orders.

Wills, Q.C., and *Jeune*, for the complainants, shewed cause. The Act cannot have intended that the only process for enforcing obedience to the order of the Court should be by deprivation consequent on three years' disobedience to the inhibition. The deprivation is to take effect even if the inhibition be obeyed, unless the incumbent undertakes in writing to obey the monition. The deprivation, therefore, is not a penalty for disobedience to the inhibition. The inhibition is analogous to the suspension of a solicitor from practice. The absurdity which results from the contention of the applicant is as great as that which would arise if, in such a case, the solicitor could obey the suspension or not as he pleased.

The provisions of 5 Eliz. c. 23, and 53 Geo. 3, c. 127, with regard to the opening and allowance of the writ de contumace capiendo in court, are repealed by necessary implication by the provisions of the Petty Bag Act, 12 & 13 Vict. c. 109, s. 26. It is provided thereby that all writs of whatsoever description may

be issued in vacation. Inasmuch as it is impossible that the writ can be issued and allowed in court in vacation, it necessarily follows that this formality was intended to be dispensed with.

Charles, Q.C., in reply. The forms approved by the Orders in Council have no statutory validity. The Act only gives power to frame rules and orders to regulate procedure. This power does not include the power to make forms. It is not a mere question of procedure whether the proceedings of a court of limited jurisdiction should shew jurisdiction or not. The Act, by s. 9, expressly gives power to prescribe a form for appealing to the Privy Council. This by implication excludes the power to frame forms in other cases. In *Hudson* v. *Tooth* (1), Lush, J., says: "Now as the Act of Parliament does not give any express power to frame forms, I do not think that form was binding on the archbishop." The monition does not follow the form in force when it was issued, for it was issued before the amended forms were issued in which the judge is described as official principal of the Arches Court. In the original forms he is described as a judge of the Provincial Court of Canterbury. The note to the original rules of 1875 giving him power to alter his title was ultrà vires. The monition, therefore, does not follow the form, and consequently ought to shew jurisdiction. It does not shew the fact that Lord Penzance had become official principal under the Act.

With regard to the argument that the provisions of 5 Eliz. c. 23, s. 1, are impliedly repealed by the Petty Bag Act, 12 & 13 Vict. c. 109, which permits the issue of writs in vacation, it is contended that formalities which are created for the protection of the liberty of the subject, such as the allowance of the writ in open court, cannot be repealed by implication.

The 25th and 26th sections of the Petty Bag Act are repealed by 38 & 39 Vict. c. 66, and 42 & 43 Vict. c. 59.

It is contended that the judge under the Public Worship Regulation Act, previously to his becoming official principal, was not an ecclesiastical court within the meaning of 53 Geo. 3, c. 127, and consequently previously to that time could have no power of signifying for contempt. He was judge merely of a

(1) 3 Q. B. D. 58.

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new court of peculiar and limited statutory jurisdiction, having only the power given him by the Public Worship Regulation Act. Becoming official principal of the Arches Court does not enlarge his statutory jurisdiction.

The inhibition is not brutum fulmen even though it cannot be enforced by significavit. The effect of it is that the party complained of ceases to be lawful minister of the church, and has no right to officiate there, and may be dealt with accordingly if he insists on officiating. The inhibition under the Public Worship Regulation Act may be compared to the inhibition pendente lite by the bishop under the Church Discipline Act. It cannot be contended that on disobedience of that sort of inhibition a significavit could be issued.

Cur. adv. vult.

Dec. 13. The following judgments were delivered :—

LORD COLERIDGE, C.J. I am now to give judgment in these four rules which it has been agreed shall be heard and determined together, because, as the four rules raise a variety of points which are all more or less connected, it is far more convenient that a single argument should dispose of them all.

The rule in which Mr. Dale is defendant raises technically the question whether the writ de contumace capiendo is good either in itself or in respect of the proceedings which have taken place since it was issued, and whether therefore it affords a good answer to the writ of habeas corpus. The three rules in which Lord Penzance is defendant raise in various forms the question of his jurisdiction ; one is to prohibit him from proceeding further in the matter of Mr. Dale; another to supersede the writ de contumace capiendo, on the ground that the monition, inhibition, and significavit were issued by Lord Penzance without jurisdiction; another for a certiorari to remove and quash the monition and inhibition of Lord Penzance and the requisition of the Bishop of Exeter, on the ground that they are all defective for want of jurisdiction. All these rules raise in various forms and on various grounds objections to the jurisdiction of Lord Penzance ; the first one raises certain further questions as to the writ de contumace after it was issued from the Petty Bag, and the determination of

these questions in Mr. Dale's favour might entitle him to his discharge, even although everything done by Lord Penzance was done in proper form and within his jurisdiction. It will be convenient to consider the points as they arise in order of right reasoning, and to dispose of them so as if possible not to go over the same ground twice.

First, then, it is said that before Lord Penzance was entitled to exercise any judicial function as official principal of the Arches Court of Canterbury he must have taken the oaths and made the subscription prescribed in the 127th of the canons of 1603–1604. It was contended that the canon is still binding, and the case of *Rex* v. *Verelst* (1) was cited as shewing that the appointment of an ecclesiastical officer "contrary to the canon," to use Lord Ellenborough's words, and therefore, if the case is in point, the appointment of Lord Penzance, must be treated as a nullity. There are minds, I suppose, though it is very difficult to realise the supposition, to which an objection of this sort appears to have reality and substance. But I am of opinion that there is nothing in it.

I do not rest my decision upon the argument that the official principal of Canterbury is not within the 127th canon. If it were necessary, as it is not, to decide that question, I should as at present advised hold that he is within it. Neither do I rest my decision upon the recent changes made by Parliament in the law of oaths and subscriptions. It seems to me that the 37 & 38 Vict. c. 85, s. 7, has conclusively settled the question. It is the law of the realm, binding on all the subjects of the Queen, that in certain events, which events have in fact happened, Lord Penzance shall become official principal of the Arches Court of Canterbury, and that "thereafter," i.e., after he has so become official principal, which he has in fact become, and which in fact he is, all proceedings taken before him in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury. Mr. Dale's is such a matter, and these proceedings are such proceedings, and it appears to me that the question is concluded. It is admitted that by the 1st paragraph of the 7th section the earlier part of the 127th canon, which refers

(1) 3 Camp. 432.

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to qualification, has been abrogated; it is plain to me that by the 3rd paragraph of the 7th section the part of the 127th canon which refers to oaths and subscriptions has, if it ever bound the official principal of the Arches Court, been abrogated likewise. It is unnecessary to say more, but I will point out that *Rex* v. *Verelst* (1) is not in point. That case decides that, where an ecclesiastical officer is appointed contrary to the only law which governs his appointment, such appointment is bad. It is used in support of a contention that where an appointment is unquestionably valid by Act of Parliament a canon can annex conditions to the exercise of the functions of a person so appointed, a contention to which *Rex* v. *Verelst* (1), when accurately examined, yields no support whatever. The defendant's first point therefore entirely fails.

Secondly. Next it is said that Lord Penzance had no jurisdiction, because his jurisdiction rests upon the transmission of the representation by the bishop to the archbishop, and upon the requisition of the archbishop to the judge, according to the provisions of the 9th section of the 37 & 38 Vict. c. 85 taken together with and qualified by the provisions of the 16th section. Now here it is said that the appointment of the Bishop of Exeter to act both for the Bishop of London and the Archbishop of Canterbury (both of whom were within the meaning of the 16th section "patrons" of Mr. Dale's preferment) was a bad appointment; and that even if it was good his requisition to Lord Penzance was bad on its face, for not stating that a copy of the representation was transmitted to Mr. Dale according to the provisions of the 9th section, and conferred therefore on Lord Penzance no jurisdiction to hear the matter of the representation. It is, I know, quite in vain to protest against the time of a court of law being wasted, as I think it has been, upon questions such as these. They are raised, and they must be decided. But before I decide them I must observe that from this point in the discussion to the very last of the acts of Lord Penzance, it has not been even faintly suggested that anything wrong has been done in point of fact; that any notice has been omitted, that there has been any hasty action, that in any single point, however small, the substance of justice

(1) 3 Camp. 432.

has been violated. All the proceedings have been in fact according to law; of all of them Mr. Dale has had notice; on none of them has he attended; against none of them has he made any defence; and now when he has brought upon himself the punishment of disobedience to the orders of one of the Queen's courts, he comes to another of the Queen's courts, not to complain (for of that, as I have said, we have heard no whisper) of any unjust or illegal act of the former court, but to take exception if he can to the phraseology of the various legal documents in which those acts are stated. It is no part of my duty to express any judgment on such conduct; it is, I think, my duty to state it with strict accuracy. Now his first point is that under the 16th section, as the Bishop of London and the Archbishop of Canterbury were both patrons of St. Vedast, one bishop should have been appointed under the sign manual of the Queen to act for the bishop and another for the archbishop, because under the 9th section the bishop is to determine whether the case is to be heard, the archbishop to fix the area for the hearing. The point is naught. Under the 16th section the patron bishop discharges none of the duties imposed on a non-interested bishop by the 9th section. If the papers come to him he simply has to send them on to the archbishop as papers which have reached him wrongly, and with which he has nothing to do. In the case of a patron archbishop, which is this case, the Queen may appoint under her sign manual, as in this case she has thought fit to do, a bishop or archbishop to act in place of the disqualified archbishop. In this case it appears that the Bishop of Exeter was appointed in terms to act both for the bishop and archbishop. This appointment to act for the bishop was, I think, unnecessary, and may be rejected without in any way affecting the validity of his appointment to act for the archbishop. But if it was necessary the same bishop may well be appointed to act for both; the Act of Parliament does not forbid it; the functions of the two, though different, are nowise inconsistent, and may well be performed for the two by one and the same person.

Next it is said that the requisition of the Bishop of Exeter conferred no jurisdiction on Lord Penzance, because it did not state: 1. That the representation had been transmitted to Mr.

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Dale; 2. That the parties had been required to state whether they would submit to the discretion of the bishop; 3. That they had not stated their willingness to submit to the bishop; 4. The place where the matter of the representation was to be heard.

Now, as to the first objection, it appears to me that it was wholly unnecessary to state in the requisition the fact that the representation had been transmitted to the incumbent. It was an incident of procedure, not a fact essential to jurisdiction.

As to the second and third objections, I think that they fail in fact. The requisition appears to me by necessary intendment to state the facts which it is argued are omitted.

As to the fourth, I think that within the meaning of the Act of Parliament the place is stated. It would be enough if the words of the 9th section were simply followed. In this case some selection has in fact been made.

The following paragraph of the 9th section, it is to be observed, leaves to the judge to give notice of the time and place at which he will proceed to hear the matter, and this language seems to me to shew that, as the time is clearly not to be fixed by the archbishop, neither is the place to be fixed by him in the narrow and restricted sense contended for by the defendant. I am, therefore, of opinion that none of these objections can be sustained even if they can be made. But I am further of opinion that if these objections existed they are unavailing in point of law.

It is not necessary to give the judge the jurisdiction to hear that every incident which gives the archbishop (or in this case the bishop) the right to send his requisition to the judge should appear on the face of the requisition. Quite apart from an answer presently to be considered, the requisition appears to me abundantly sufficient; and if it were not, I think that its sufficiency cannot be questioned by the defendant in this proceeding. If the judge is properly appointed, if the matter is within his jurisdiction, if he be called upon to act by a person who has jurisdiction to call upon him, if he has been called upon, and if as regards the defendant he has acted within his jurisdiction, the defendant cannot criticise and take exception to the language of the instrument which has called upon the judge to act.

Such objections, if available at all, might be available on the

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part of the judge if he refused to act and this Court were to endeavour to compel him. No case has gone the length of saying that a person in the position of the defendant can question jurisdiction on grounds of this kind. There is no authority for any such proposition, and I decline to make one. The next objection, or rather series of objections, which arise in point of order are the various objections which have been taken to the language of the monition and inhibition, as not setting forth with sufficient particularity the various facts which must have existed to give the judge jurisdiction to issue them. Much time and infinite ingenuity were expended upon this branch of the argument, and many cases were cited which, but for an answer which I am about to give, it might have been necessary to examine in detail and at length, but it is not necessary. I throw no doubt upon the general principle that courts of limited jurisdiction must shew upon the face of the legal instruments they employ the facts which give them their jurisdiction and give validity to their legal instruments. I throw no doubt upon the existence or the importance of the power of this Court to compel such courts to exercise their jurisdiction if they decline, and restrain them if they exceed it. But in this case I think that a higher power than this Court has intervened; and that the forms which I am now examining, and one which I have examined, namely, the requisition, have each and all of them the sanction of Parliament. If this is so, it is useless to inquire how the matter would have stood if the forms employed had no such sanction.

By the 19th section of 37 & 38 Vict. c. 85, it was enacted that the Queen in Council, with the advice of certain eminent persons, including the Lord Chancellor and the Lord Chief Justice of England, may cause rules and orders to be made for regulating the procedure under the Act. Such rules and orders are to be laid before each House of Parliament in manner specified. If either House addresses Her Majesty praying that any rules may be annulled, the Queen in Council may annul such rules without prejudice to the validity of any proceedings taken under them. Rules and orders under this section have been made by the Queen in Council, and have been laid in manner specified before each House of Parliament; as portions of such rules and orders forms

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have been drawn up; those forms with an exception (trivial, but to which I will refer,) have been followed in all the documents now under consideration. I am of opinion that, so far as the rules and orders, including the forms, conform to the statute and are not inconsistent with it, the rules, orders, and forms have parliamentary authority. It is said that the power to make rules and orders regulating procedure does not include the power to frame forms which are procedure. It is said that the statute having, as it has, in more than one place mentioned a form as to be prescribed by rules and orders must be taken to have intended that only such forms as are referred to were to be prescribed by rules and orders. I can assent to neither contention. Not to the first for various reasons. Forms are amongst the most important parts of procedure, and especially in ecclesiastical matters are the parts most requiring to be shortened and simplified by authority. In the analogous cases of the Court of Probate and the Court of Divorce, under words not to be distinguished from the words before me, forms have been drawn up which for five-and-twenty years no one has ever dreamed of disputing. The same thing has happened under 15 & 16 Vict. c. 76, s. 223 (the first part of it), the Common Law Procedure Act, 1852. Nor does the fact that other statutes, such as the 9 & 10 Vict. c. 95, s. 78, have given the power to frame forms in express terms appear to me to shew that where words abundantly wide enough to give the power are used their breadth is to be limited, because other statutes under other circumstances have been more specific in their language.

Neither can I assent to the second contention drawn from the words of the statute itself. The fact that the statute speaks more than once of a form to be prescribed by rules and orders, seems to me conclusive to shew that under the general power to frame rules and orders, when used in the latter part of the statute, the power to frame forms was intended to be included. And though the observation be perhaps minute, it is yet true that in two cases at least where forms are mentioned in the Act itself, they are forms hardly of procedure under the Act, for the first is the form of complaint to the bishop, which is a request to him to put the Act in operation, a request which he may grant or refuse at his absolute discretion; the other is a form of appeal when the procedure

under the Act is over, and which but for the Act it might seem more proper that the Judicial Committee should prescribe. Moreover, if the power to frame forms is given by the statute, I am clear that these forms are within the power. It is to my mind idle to suppose that nothing more was given than power to frame forms which should be good at common law. No parliamentary power was needed to frame forms which would be good without such power, and I have myself little doubt that the power was given for the very purpose of avoiding the minute objections and elaborate arguments to which we have been forced in this case to listen. I come, therefore, clearly to the conclusion that these forms have parliamentary authority, and are binding on Lord Penzance; it is admitted that they have been followed with two exceptions, to which I will advert: it is not suggested that in point of fact Lord Penzance has in any respect done anything exceeding his jurisdiction, and I think, therefore, that all the objections founded upon the language of the requisition, monition, and inhibition, fall to the ground. The two exceptions remain to be considered. It is said that the requisition of the Bishop of Exeter does not exactly follow any form. Nor does it. The case of a bishop and archbishop being both interested in the patronage of a living appears to have been omitted, and the form of the requisition, therefore, in this case follows the forms "as nearly," to use the words at the head of the appendix of forms, "as the circumstances of the case will allow." The words "we have signified such failure to the said archbishop" are admitted to be inaccurate and inapplicable, but they may be rejected without vitiating the form, which remains perfectly good without them.

Next it is said that the forms used do not follow the forms given in the rules and orders, and are not in accordance with the statute, for that they misdescribe the judge, and that he has in them affected to act as official principal of the Arches Court of Canterbury, whereas his jurisdiction under the Act is not that of official principal, but only of judge of the Provincial Court of Canterbury. In my opinion this objection fails also. When the rules and orders were first issued by the Queen in Council on the 28th of June, 1875, the places of official principal of Canterbury and York were both full, and the proper style of Lord Penzance,

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the style given him by the Act, was Judge of the Provincial Courts of Canterbury and York. So he might have remained for many years if the official principals had neither died nor resigned. Accordingly the forms drawn up under that state of things call him by the only name he was then entitled to bear. But by the resignation of Sir Robert Phillimore in October, 1875, he became official principal of the Arches Court of Canterbury by the direct operation of the statute, as I have explained at the beginning of this judgment. Thereafter that was his title; thereafter all proceedings before him became proceedings in the Court of Arches; thereafter all forms which had theretofore run in his name as judge of the Provincial Court, ran, by force of the statute, in his name as official principal, and I think in this respect that the note appended to rule 65 of the Rules and Orders of 1875 was really unnecessary, and prescribed only what the law would have prescribed if there had been no such note. Not that proceedings, though in the Court of Arches, ceased to be proceedings under and limited by the statute, but that proceedings under and limited by the statute became statutory proceedings in the Court of Arches. The passage from the judgment of my brother Lush in *Serjeant* v. *Dale* (1) is capable of being construed as meaning no more than I have now expressed, and I have the highest authority, his own, for saying that in his mouth it did mean no more. Sir Alexander Cockburn cannot tell us what he intended by his language in *Hudson* v. *Tooth* (2). But he, too, may have intended to expound the statute as I have expounded it, and I think he did, because his language in respect of the Act if pressed further would certainly be inaccurate, a thing very unlikely in any case, and, with the statute actually before him, all but impossible. I may say in passing that I do not presume to cast any doubt on the authority of these cases. Both were, in my judgment, perfectly rightly decided, but they have no bearing on the present point. I think, therefore, that the objection to these documents, so far as it is founded on any supposed misdescription of the judge, entirely fails.

I pass from these technicalities to the one point of substance in the case; a point well worthy of argument and not to be decided

(1) 2 Q. B. D. 566.

(2) 3 Q. B. D. at p. 53.

without much consideration. It may in substance be thus stated. This is a new and statutory proceeding; the incumbent, if he is found in the wrong by the bishop or judge, is to be ordered to do or to abstain from doing certain things by monition from the bishop or judge as the case may be. The 13th section of the Act enacts that the monition shall be enforced by a new process of inhibition, and if submission to the monition in the way pointed out by the 13th section is not made by the incumbent for three years his benefice at the expiration of that time becomes ipso facto void. You cannot, it is said, look beyond the statute, there is no power given by it to enforce obedience to the inhibition, and as far as the inhibition is concerned the judge or court has been left without any legal power. It may be that it was thought the inhibition would bind the conscience, but, if it does not, then for three years, and subject to the penalty at the end of three years, the monition may be disobeyed and the inhibition defied. It is contended, on the other hand, that thus to construe the statute would be to bring a scandal on the administration of justice, to leave to the clergy only of all the subjects of the Queen the power of obeying or disobeying for three years, at their pleasure, the provisions of an Act of Parliament, that it is incredible that Parliament should have passed a special statute to enforce in a short and inexpensive way a certain uniformity of ceremonial, and yet have left the Court intrusted with this special duty without the power of doing the duty intrusted to it. These and the like considerations were pressed upon us with much force by the counsel who appeared for Lord Penzance and for the churchwardens.

I am not insensible to considerations of this sort on either side. And if the statute stood alone there would be much to be said. At first sight the 13th section seems to be complete in itself, and to enact the way, and the only way, in which obedience to the monition is to be enforced. Such, I confess, was my first impression. Not having been for many years familiar with ecclesiastical disputes, and never having been familiar with them when the matters disputed about were vestments of the clergy and the particular postures or gestures which a clergyman might or might not assume or use in conducting the public worship of a congrega-

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tion, it struck me as possible or even probable that Parliament might never have contemplated as reasonably possible that clergymen belonging to the establishment would deliberately disregard and defy the law of their society pronounced by the highest court of appeal in the country, and claim for disobedience to the law in matters such as these the sanction of conscience and the credit of virtue. For these are not "the weightier matters of the law, judgment, mercy, and faith," but, at the best and highest, points more or less interesting of ceremonial observance—points on which, prior to experience, it would be difficult to believe any man could persuade himself that disobedience to the law was a matter of moral obligation. And, as certainly the inhibition pendente lite under the Church Discipline Act could only be enforced, if the clergyman defied it, by a process so lengthy and cumbrous that practically it could not be enforced at all, I should have been disposed to hold, if the statute stood alone, that Parliament had not contemplated the possibility of disobedience and defiance; had assumed that clergymen, like other men, would obey the law of their country, and had not enacted any specific mode of enforcing an obedience which it took for granted would be rendered. But the statute does not stand alone. It follows 5 Eliz. c. 23, and 53 Geo. 3, c. 127, the latter statute substituting the writ de contumace for the writ de excommunicato capiendo, keeping alive by express enactment many of the forms of the statute of Elizabeth, and containing these words: "in all causes which according to the laws of this realm are cognisable in the ecclesiastical courts when any person or persons having been duly cited to appear in any ecclesiastical court or required to comply with the lawful orders or decrees as well final as interlocutory of any such court shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such court," "it shall be lawful for the judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the court shall have been committed, to pronounce such person or persons contumacious and in contempt, and within ten days to signify the same . . . . to His Majesty in Chancery . . . . and thereupon a writ de con-

tumace capiendo shall issue from the Court of Chancery." What may have been the intention of the Parliament which passed the 37 & 38 Vict. c. 85, I have no means of knowing except from the Act itself. The Act has not excluded the operation of the Act of George III. Lord Penzance was made by 37 & 38 Vict. c. 85, an ecclesiastical judge in an ecclesiastical court; there was a cause cognisable before him; there was a person duly cited; there was a lawful order made with which that person was required to comply; that person has refused to pay obedience to such lawful order. It seems to follow that by the plain and direct enactment of 53 Geo. 3, this significavit properly issued. I think this would have been so if Lord Penzance had remained only judge of the Provincial Court of Canterbury; it is none the less so according to the view I have already expressed, because since the passing of the Act the events contemplated in the 7th section have happened, and he has become official principal of the Court of Arches. I have come, therefore, to the clear conclusion, that the 13th section of the Act is not exclusive, and that the power to commit for disobedience to the inhibition exists in and has been properly exercised by Lord Penzance.

There remains the question whether the provisions of the 5th Eliz., expressly re-enacted by the 53 Geo. 3, in respect of the writ de contumace, are still in force. If they are, I cannot think that they are directory only. The case of *Le Roy* v. *Colgate* (1) and the case before Lord Cottenham, *In re Baines* (2), appear to me quite impossible to reconcile with any such view, and whatever may be the weight due to the reports of cases in Siderfin on points of law (see per Lord Holt, *Hayward* v. *Wilson* (3), and per Dolbin, J., in *Reg.* v. *Lee* (4)), the case I have referred to is very strong indeed as evidence of the practice existing at that time. But I think that the provisions of the statutes of Elizabeth and George III., so far as the latter statute re-enacts the statute of Elizabeth, are no longer in force. Assuming that the writ de contumace capiendo issues out of the Petty Bag (as I believe all original writs did), I think the 12 & 13 Vict. c. 109, by necessary implication, repeals so much of the Act of Elizabeth and of 53 Geo. 3, c. 127,

(1) 1 Sid. 165.
(2) 1 Cr. & Ph. 31.
(3) Comberb. 377.
(4) 1 Show. 252.

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s. 1, as requires the capias to be brought into and opened and allowed in Court. When that Act passed, Trinity Term ended in June, I think on the 11th of June. All the interval between that and the 2nd of November was vacation, during which the Court (i.e. the Court in Banco) could not sit, so that no proceeding of this nature could be taken between those dates. The 26th and 27th sections of the Petty Bag Act are most explicit; "All writs of whatsoever description may be issued and returned in vacation;" the required interval of twenty days between the teste and either the day named for the return or the day of the actual return being preserved. The intention plainly was to allow such proceedings to be taken and executed in vacation at a time when there was no Court of Queen's Bench sitting in which the writ could be opened and allowed. It follows that it might be executed without that formality, if the substance of the requirement be preserved, viz., that the writ be entered of record in the Court of Queen's Bench, so as to give the Court jurisdiction over it. The two Acts cannot stand together and therefore the later one repeals pro tanto the former one. It is needless to say that if the former Act was repealed pro tanto it was not revived by the Judicature Act, 1873, which abolishes terms altogether, and authorizes though it does not require the Court to sit in the holidays and vacations. For all these reasons it appears to me that judgment must be given for the Crown in the rule in which Mr. Dale is defendant, and for Lord Penzance in the three other rules in which he is defendant.

FIELD, J. I have arrived at the same result as my Lord, and by the same course of reasoning. The applicant is in custody under a writ from which it appears that it has been signified by Lord Penzance to the Court of Chancery that the applicant has been guilty of contempt of Lord Penzance's court by wilfully refusing to obey the order of such court. We have accordingly to consider whether Lord Penzance had the jurisdiction which he has exercised, and whether the applicant is therefore rightly in custody. The applicant has disobeyed an inhibition issued in consequence of his disobedience of a monition admonishing him to abstain from certain practices in the conduct of divine worship

which had been determined to be contrary to law. If it appears from the writ returned to us that all the matters existed necessary to give jurisdiction to Lord Penzance to do that which he has done, and if those matters really did so exist, we have no power to order the discharge of the applicant from custody. At the outset it appears to me material to observe, as has been already observed by my Lord, that the applicant does not allege that any of the matters essential to Lord Penzance's jurisdiction, if he has such jurisdiction, did not as a matter of fact exist, or that any of the matters alleged in the writ or other proceedings are untrue. It is not, for instance, alleged that in fact the applicant had not notice of the representation, and full opportunity, if he had been so disposed, of submitting to the decision of the bishop on the matter in question. Various objections were taken to the proceedings, but I am of opinion that they all of them fail. All but one of these objections appear to me to be most unsubstantial, mere technical matters which in no way go to the justice of the case. The various points taken arise as follows:—

In consequence of the fact that the Bishop of London and the Archbishop of Canterbury were interested parties, recourse was had to the provisions of the 16th section of the Public Worship Regulation Act, and Her Majesty appointed the Bishop of Exeter, as being a bishop entirely uninterested, to deal with the matter. It is first of all alleged as an objection that, the Bishop of London and the archbishop having distinct duties to perform, one person could not act for both of them. I am of opinion that there is nothing in that objection. It is the duty, primâ facie, of the bishop to consider the circumstances of the case, but if he is interested it becomes the duty of the archbishop to act in his place. If the archbishop had not been also interested in the matter he would have had to perform the two duties, viz. the duty of the bishop in considering the case and also the duty imposed upon him of requiring the judge to hear the matter of the representation as directed by the Act. If the archbishop is interested, the bishop appointed by Her Majesty performs the double duty which would otherwise have devolved on the archbishop.

The counsel for Mr. Dale urged that the statute did not seem

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to have contemplated the case that has arisen. The language, however, seems to me to cover it, and consequently this objection entirely fails.

It is then further contended that no jurisdiction is shewn, because the requisition to the judge does not allege that the parties were required to state whether they were willing to submit the matter to the bishop, or that any notice of the complaint was given to the party complained of. I am inclined to think that it does appear by necessary intendment, on the true construction of the requisition, that sufficient notice of the complaint was given to the party complained of, and that the parties were required to state whether they would submit the matter to the bishop. But however this may be, I know of no authority or principle which renders such allegations essential to the validity of the subsequent proceedings. It is true that, in the case of convictions and orders by a tribunal of limited jurisdiction, all the facts necessary to the validity of such convictions or orders must appear on the face of them; but there is no authority to shew that the same principle applies to such a proceeding as the requisition to a judge to hear the complaint, such requisition not being a matter upon which the party proceeded against has to act, but a matter solely for the judge. If the judge is satisfied with the mode in which he is required to act, and that the facts exist necessary to give him jurisdiction, I am at a loss to see how the omission of the allegations, the absence of which is objected to, can make the subsequent proceedings void as against the party complained of.

Then, thirdly, it is objected that the bishop has omitted in the requisition to state sufficiently the place at which the hearing is to be. The words of the 9th section of the Public Worship Regulation Act are, "The archbishop shall forthwith require the judge to hear the matter of the representation at any place within the diocese or province, or in London or Westminster." The requisition in the present case follows the words of the statute, except that in conformity with the form given by the rules it omits the province. The question is whether the requisition under these circumstances is sufficient. These words of the Act have been the subject of judicial decision. In the case of *Hudson* v.

Tooth (1) the archbishop used the same form as the bishop has here. Lord Penzance heard the matter at a place not in London or Westminster or the diocese, and it was consequently held, reluctantly, that the hearing at such place was not within the jurisdiction of Lord Penzance acting under the requisition. In the present case no such point arises. The hearing here was at a place within the jurisdiction as defined by the requisition. But it is urged that the requisition is bad because the bishop has not named some particular place within the limits given by the Act. I do not think that the statute renders this necessary. Before the statute a clerk could not be cited out of the diocese. It seems to me the reasonable construction that the Act did not mean to leave the selection of the place entirely to the judge, but meant that the archbishop should fix the limits within which the judge might select a place. The subsequent words, which provide that the judge shall give notice of the place of hearing to the parties, seem strongly to confirm this view. This matter appears to be almost concluded by what was said by the Court in *Hudson* v. *Tooth*. (1) Lord Justice Lush there says, "The archbishop is to fix the limits within which the proceeding is to be heard, and having so done, the judge is to appoint the particular place within those limits at which he intends to sit."

I next come to the objections depending upon the construction of the monition and inhibition. It is said that no jurisdiction is shewn by either of these documents because the title given to Lord Penzance is official principal of the Arches Court of Canterbury. That objection, in my opinion, also fails. Under the Act Lord Penzance was appointed judge of the Provincial Court of Canterbury. And on the happening of a certain event he was to become official principal of the Arches Court. That event did occur, and thenceforward all proceedings before him must be deemed to be proceedings in the Arches Court. In all subsequent instruments, therefore, as it seems to me, the proper mode of describing Lord Penzance was by his title as official principal of the Arches Court. It was suggested, though the suggestion seems so far-fetched that it is hardly necessary to refer to it, that it might be supposed from the document that Lord Penzance was

(1) 3 Q. B. D. 46.

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acting as an official principal appointed before the Act. I do not think that there is anything in that suggestion.

The next objection seems to me a very extraordinary one: it is said that Lord Penzance has never been validly constituted official principal at all, and that every act which he has ever done as such is void because he has not taken the oath prescribed by the canon that has been referred to. It is unnecessary, in my opinion, to determine whether the canon applied to an official principal appointed in the ordinary way. Even if it were so, no authority appears to go the length of shewing that the failure to take the oath would vitiate all his proceedings. I think that, however this may be, Lord Penzance was under no obligation to comply with the canon. He was, on the happening of a certain event, constituted de facto and de jure the official principal of the Arches Court. The qualifications imposed by the statute are only that he shall be a member of the Church of England, and shall sign the declaration given in the schedule to the Act. It seems to me that it is distinctly enacted that, being a member of the Church of England and having signed the declaration, he shall hold the office to which he is appointed without the necessity of taking any other steps whatever.

The next point is one which, when the writ was moved for, did seem to me one of a serious character. It was argued that all these proceedings, being proceedings in a court of limited jurisdiction, ought to contain on the face of them averments of the existence of all conditions precedent necessary to support the proceedings. It seems to me, however, that the course taken by the legislature obviates this difficulty. The monition and inhibition are in the forms given under the Act. My Lord has come to the conclusion, and I entirely agree with him, that the forms so provided justify the manner in which these documents have been framed. I have already observed that there is no suggestion that in point of fact all these matters, which it is said ought to have been averred, did not exist.

The chief remaining objection is one of considerable weight. It is contended that Lord Penzance had no power by virtue of the Act to signify Mr. Dale's disobedience to the Court of Chancery. I am bound to say that I was in the first instance much impressed

by the arguments on this point, but on hearing the arguments on the other side I have come clearly to the conclusion that the contention cannot be supported. It cannot be that the legislature could have intended not to give the power which Lord Penzance has exercised. At the time when the Public Worship Regulation Act passed, the Act applicable to these matters was the Church Discipline Act. That Act dealt with ecclesiastical offences generally, and amongst them with those included in this Act. The Public Worship Regulation Act has not in any way repealed the former Act. The earlier Act included, as well as the offences aimed at by the later Act, charges of a more serious nature, such as charges against criminous clerks, and with respect to matters of faith. Before the passing of the later Act, as we know, various questions were warmly agitated with regard to vestments and other matters of ritual, and a great deal of interest was excited thereby. The legislature in consequence made certain special provisions with regard to these particular matters, but the jurisdiction of the Court of Arches was left wholly untouched by these provisions. Three particular matters were selected for the purpose of special treatment. The preamble of the Act recites that it is expedient that in certain cases further regulations should be made for the administration of the laws relating to the performance of divine service, according to the use of the Church of England. To secure the regularity, uniformity, and proper performance of divine worship is therefore the object to be effected by the Act. It is provided that nothing in the Act except as therein expressly provided shall be construed to affect or repeal any jurisdiction which may now be in force for the due administration of ecclesiastical law. Therefore the remedies that existed under the former Act with respect to all the offences included in the Act are left in existence. If the parties here had proceeded under the earlier Act, it is not disputed that the same judge, on coming to the same conclusion as he has arrived at in this case, and issuing a monition to the same effect, would have had the same powers as he has here exercised. The later statute provides in some respects for a different mode of procedure. The proceedings are to be commenced by a representation, and an opportunity is given of bringing the matter before a species of domestic tribunal

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if the parties will submit it to the bishop: if they will not agree to do this, the judge then is to deal with the case, and the bishop or the judge, as the case may be, may issue a monition. The question then arises, what power the bishop or judge has to compel obedience to that monition. The effect of the 13th section is without doubt that such monition is to be enforced by an inhibition. It was probably supposed by the legislature that obedience would be secured by that process, and accordingly it is provided by the section that obedience shall be so enforced, and that if the inhibition shall continue in force for more than three years the benefice shall become void. But no particular machinery is provided by the Act for enforcing obedience to the inhibition. It is no doubt true, that the liberty of the subject ought not to be restrained except in accordance with an express provision or necessary intendment to that effect. No such express provision exists here, but I think that it must necessarily be implied that the power here exercised is given. If not, what is the consequence? The provision for the inhibition is in order to enforce the monition and to compel the incumbent to obey it. If the applicant's contention is correct, the inhibition would not have the desired effect, because, notwithstanding its issue, the incumbent may continue the practice complained of for a period of three years.

Here we have a statute passed for the express purpose of more readily and conveniently enforcing uniformity and regularity in the performance of divine worship. How is that object effected, if obedience cannot be compelled, and the incumbent cannot be prevented from repeating the acts adjudged to be unlawful for a period of three years in contempt and violation of the order made by the Court? If the court constituted under the Act has not a power of this sort it differs from all other courts that I know of. All other courts have powers of attachment or imprisonment for contempt, or other analogous powers, in order to enforce their orders and to compel obedience. The restraint of personal liberty is a serious thing, but there is, in such a case as this, no other mode by which obedience to the lawful orders of a court can be enforced. The legislature must, I think, be presumed to have been aware that this power existed and was ordinarily exercised

under the Church Discipline Act, viz., the power of employing the process of contempt given by the Act of George III., a power given expressly to all ecclesiastical courts, and in all causes which, according to the laws of the realm, are cognisable in the ecclesiastical courts. It seems to me the most reasonable view that the legislature made no express provision for enforcing the inhibition in this way, because they knew that sufficient powers for so doing existed already, and supposed that in appointing the judge official principal of the Arches Court they were clothing him with all the necessary authority to enforce obedience to his decrees. The jurisdiction is no doubt a new one, but it is to be exercised by a judge also possessing an already existing jurisdiction, and already clothed with all the powers incidentally necessary for compelling obedience to the orders made by him in the exercise of the new jurisdiction.

For these reasons, I come to the conclusion that on the main point our decision must be against the applicant. With regard to the remaining points that have been urged, which are of a highly technical nature—those, I mean, connected with the issuing of the writ de contumace capiendo—I agree with the decision of my Lord and my Brother Manisty.

MANISTY, J. The proceedings out of which the present applications arise are proceedings taken under the Public Worship Regulation Act, 1874, against the Rev. Thomas Pelham Dale, a clerk in holy orders of the Church of England and rector of the united parishes of St. Vedast, otherwise Foster, and St. Michael le Querne, in the city and diocese of London, for offences against the laws ecclesiastical.

It is not, neither could it be, denied that the alleged offences against the ecclesiastical law have been committed, but it is contended (1) that some of the proceedings were informal and bad on the face of them for not sufficiently stating facts which shewed jurisdiction, and (2) that on the face of the proceedings Lord Penzance, the judge of the Provincial Court of Canterbury and ex officio official principal of the Arches Court of Canterbury, exceeded his jurisdiction, and that consequently the defendant, Mr. Dale, who has been arrested and imprisoned by

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virtue of a writ de contumace capiendo for not obeying an inhibition, is entitled to be discharged out of custody.

A representation having been made to the Bishop of London on the 12th of July, 1878, by the churchwardens of Mr. Dale's parish, pursuant to the Act of 1874, to the effect that he had been guilty of twelve offences against the ecclesiastical law (each of which was specified), the case came on for hearing before Lord Penzance in February, 1879, when his Lordship adjudged him to have been guilty of eleven of those offences.

Mr. Dale did not appear at the hearing or at any time during the proceedings. I do not think it necessary to add anything to what has been said by the Lord Chief Justice and my Brother Field as to the validity of the proceedings anterior to the hearing of the case and the judgment pronounced by Lord Penzance, beyond saying that I concur with them in holding that those proceedings were regular and valid. The first proceeding, as to which I desire to make some remarks, is the monition which followed the judgment.

Two objections are made to it, one that Lord Penzance is not correctly described in it, the description given being that of "official principal of the Arches Court of Canterbury," and the other objection being that the monition does not sufficiently shew on the face of it that Lord Penzance had jurisdiction to issue it.

With reference to the first of the objections, it is necessary to consider what office or offices Lord Penzance filled at the time when he heard the case and issued the monition on the 21st of February, 1879.

In 1874 he was duly appointed a judge of the Provincial Court of Canterbury, and in October, 1875, he became, by virtue of the Act of 1874 and the resignation of Sir Robert Phillimore, ex officio "official principal of the Arches Court of Canterbury." Now the Arches Court of Canterbury was and is the Provincial Court of Canterbury, and the official principal of the archbishop, or his substitute, was prior to the time of Lord Penzance's appointment the only person who could administer justice in that court. The Provincial Court of Canterbury got the name of the Arches Court in this way. There was an officer of the archbishop called

the Dean of the Arches who had a limited jurisdiction over thirteen peculiars of the archbishop in the city of London (now abolished), and who was often the same person who held the office of official principal. This person, either as official principal when he held both offices, or acting as substitute for the official principal when he held the office of Dean of the Arches only, used to hold his Court in Bow Church, in the city of London, which had a steeple rased at the top with stone arches; hence the judge who administered justice in the Provincial Court of Canterbury came to be called and known as officialis de arcubus, and the court itself as curia de arcubus. A wrong notion thus obtained that it was the Dean of the Arches, as such, who had jurisdiction throughout the province of Canterbury, whereas the jurisdiction of that office was limited to the thirteen peculiars of the archbishop in the city of London, and the jurisdiction throughout the province for receiving appeals and the like belonged to the official principal only: Gibson's Codex, 1004; Johns. 257. This accounts, in my opinion, for the language used and the provisions made in the Public Worship Regulation Act, 1874. So long as the office of official principal was held by Sir Robert Phillimore, so long also the new or additional judge of the Provincial Court of Canterbury appointed under the Act of 1874 was called judge of that court; but when the office of official principal became vacant, as it did by the resignation of Sir Robert Phillimore in October, 1875, then the judge appointed under the Act of 1874 became by virtue of that Act ex officio official principal of the Arches Court, and thereafter, by s. 7 of the Act, the proceedings before him were to be deemed to be taken in the Arches Court of Canterbury; consequently his proper style after he became official principal was that of "Official Principal of the Arches Court of Canterbury."

By that style Lord Penzance is described, and in my opinion properly described, in the monition. It runs thus: "James Plaisted Baron Penzance, Official Principal of the Arches Court of Canterbury," to the Rev. Thomas Pelham Dale, clerk, &c., greeting. It recites at length the judgment pronounced at the hearing of the representation, and it is sealed with the seal of the Arches Court of Canterbury and countersigned by the registrar

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of that court, shewing unmistakably the character in which Lord Penzance was acting.

But it is said that in the forms given by the rules and orders made in June, 1875, in pursuance of the 19th section of the Act of 1874, Lord Penzance is described as a "judge of the Provincial Court of Canterbury," and that consequently he ought to have been so described in the monition which was issued in February, 1879, when those rules and orders were in force. To this I answer that by a note at the foot of those rules it is stated that, in the event of the judge becoming official principal of the Arches Court of Canterbury, these rules and the forms prescribed shall be applicable mutatis mutandis to all cases thereafter arising, such necessary alterations in the style of the forms being made as the judge may direct. I do not think this note did more than direct that to be done which the Act required, but it shews the view entertained of the matter by the eminent and learned persons who made the rules. In my opinion the first objection to the monition entirely fails.

As regards the second objection (namely, that the monition does not sufficiently shew jurisdiction on the face of it), I think it also fails. The monition issued by Lord Penzance is in the form settled by the late Lord Chancellor (Lord Cairns) and the late Lord Chief Justice of England (Sir Alexander Cockburn), as well as by Lord Penzance and the Archbishops of Canterbury and York, and the Bishop of London. It was approved by her Majesty by and with the advice of her Privy Council, and was tacitly approved by both Houses of Parliament. Nevertheless we are called upon to say it is insufficient and bad on the face of it. I decline to do so for the reasons stated by my Lord and my Brother Field; but I am inclined to go further, and to hold that at common law, and irrespective of rule 22, and form 19 of the 28th of June, 1875, the monition stated facts which sufficiently shewed on the face of it that Lord Penzance had jurisdiction to hear the case and to issue the monition. It recites that a representation had been made by the churchwardens and heard in pursuance of the provisions of the Public Worship Regulation Act, 1874, and that the defendant had been adjudged to have offended against the statutes, laws, constitutions, and canons of

the Church of England in respect of the eleven matters alleged in the representation specifying them, and then it commands the defendant to abstain and refrain for the future from doing the things complained of and which are again specified.

One would have thought, as the eminent and learned persons thought who framed the rules and forms, that this sufficiently shewed jurisdiction to hear the case and issue the monition; but it is contended on the part of the defendant that the monition ought at common law to have set forth all the anterior proceedings, commencing with the appointment of Lord Penzance as judge of the Provincial Court of Canterbury, and stating his compliance with the Act of 1874 by making the declaration prescribed by s. 7; the vacancy in the office of official principal of the Arches Court of Canterbury, the taking by Lord Penzance of the oaths required by the 127th canon of 1603, the fact of the bishop and archbishop being interested as alternate patrons of the benefice, the appointment of the Bishop of Exeter in the place of the archbishop, compliance with the several provisions of the 9th section of the Act, and the failure of the defendant and the complainants to submit to the decision of the Bishop of Exeter without appeal, &c., &c.

A number of authorities were cited in support of this contention, but none of them, in my opinion, go the length contended for. I do not intend to go through these authorities at any length, but I think it desirable to advert briefly to them in order to illustrate the view I am now putting forward, viz., that these proceedings are good at common law. The first case to which I will allude was *Rex* v. *Bagshaw*. (1) There the trustees of a turnpike road were empowered to turn roads through private grounds, making satisfaction to the owners, and if they could not agree they were enabled, on giving notice to the owners, to summon a jury to assess the damage. The inquisition did not shew on the face of it that any notice had been given to the owners, and therefore it was held bad for the most obvious reasons.

The next case is that of *Harrison* v. *Wright*. (2) That was the case of an interpleader order which could only be made by consent. It did not state that it was by consent, and consequently it was a

(1) 7 T. R. 63. (2) 13 M. & W. 816.

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nullity. That, again, was a very obvious decision. Then comes *Christie* v. *Unwin*. (1) In that case an order was made by the Lord Chancellor, acting in bankruptcy, to substitute one petitioning creditor for another, and the order did not shew that the person applying to be so substituted was a creditor who had proved a sufficient debt to support a commission. It was stated that the person so applying was creditor in respect of a debt not anterior to the debt of the creditor who had petitioned in the first instance, yet it might have been the case, so far as appeared from the order, that he had not proved a sufficient debt to support the commission. There was therefore in that case a plain and palpable defect of jurisdiction on the face of the order.

Then there is the case of *Howard* v. *Gossett*. (2) It is unnecessary to deal with that at length. It turned upon the jurisdiction of the House of Commons, the usage and privilege of Parliament, and the effect of the Speaker's warrant. The case of *Reg.* v. *Jones* (3) was much relied upon. There a writ de contumace capiendo had issued upon the significavit of the surrogate of the bishop's official principal, and it was held that the surrogate had no right whatever to issue the significavit, and therefore the writ was bad upon the face of it and the prisoner must be discharged from custody. The last case to which I shall allude was that of *Lee* v. *Rowley*. (4) That decision turned on the 223rd section of the Bankrupt Law Consolidation Act, 1849. By that Act a person might be made bankrupt only in certain specified cases, and an adjudication was made without stating that the bankrupt came within any of those cases. Crompton, J., gives the grounds of the decision where he says, "The commission does not find that any of the cases in s. 223 have arisen. Should not that be on the face of the order according to the authority of *Christie* v. *Unwin?*" (1) It was clear therefore that there might have been an adjudication without any jurisdiction whatever. These are the authorities on which reliance has chiefly been placed.

It has never yet, so far as I know, been decided that every

(1) 11 A. & E. 373.
(2) 10 Q. B. 357.
(3) 10 A. & E. 566.
(4) 8 E. & B. 857.

step in a cause from the commencement to the conclusion, including every notice and act necessary to make the proceedings regular, must be stated on the face of an order or decree made by a court having limited statutory jurisdiction. If there be such a decision, I should very much doubt its correctness. It is one thing to say the order of such a court must on the face of it shew jurisdiction, and another thing to say it must set out all the proceedings anterior and down to the time of making it. Further, I am inclined to think the Arches Court of Canterbury as now constituted is a superior Court. The doctrines as to what constitutes a superior court and an inferior court, to what extent credit is to be given to the proceedings of a superior Court, and what it is necessary to set out on the face of the proceedings in the case of a superior court and an inferior court, are dealt with at length in the very remarkable and learned judgments of Erle, C.J., and Willes, J., in the case of *Ex parte Fernandez.* (1) I do not propose to go into the questions there discussed at large. The point there raised was whether the court of a judge sitting under a commission of assize was a superior court, within the meaning of the cases to which I have adverted, and which established the rule that in certain cases a court having a limited statutory jurisdiction must on the face of its orders state everything necessary to shew jurisdiction. It was held that it was a superior court, and therefore that it was sufficient in a warrant of commitment for contempt to state the contempt in general terms, without specifying the grounds upon which the adjudication for contempt proceeded. Having regard to the terms of the Public Worship Regulation Act, by which the court of Lord Penzance as now constituted is made a court of record, and having regard to the extensive jurisdiction which it exercises, the qualifications of the judge and the general character and constitution of the court, I am very much inclined to think that it might, on similar grounds to those which prevailed in *Ex parte Fernandez* (1), be held to be a court to whose proceedings credit is to be given, in the same way as credit is given to the court of assize. But be that as it may, I am clearly of opinion that the monition is good for the reasons assigned by the Lord Chief Justice and my Brother Field.

(1) 10 C. B. (N.S.) 3. 7 Jur. N.S. 571

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The next document which is said to be invalid is the inhibition which was issued on the 19th of March, 1880.

Amended rules and orders with forms were allowed and issued on the 22nd of February, 1879, the day after the monition was issued. (1) Those amended rules and orders were made by the same eminent and learned persons who made the rules and orders of June, 1875. (2) They were also allowed by the Queen in Council, and tacitly approved by both Houses of Parliament. By the amended rule 37 it is provided that it shall be competent for the complainant, at any time after service of the monition, to apply to the Court to enforce obedience to the monition. In case of disobedience to the monition of the judge, the application to enforce obedience to it is to be made by motion, and by rule 38 an inhibition, if ordered by the judge, is to be issued from the provincial registry upon the application of the complainant, and the form of it is given in the Appendix No. 26. That form was adopted in the present case, and for reasons already given with respect to the monition, I am of opinion it is free from the objections which have been taken to it. I may observe that as regards the style of the judge it is that of "Official Principal of the Arches Court of the Province of Canterbury," which shews that in the opinion of the framers of the amended rules the style adopted in the monition was the correct one.

I now come to the question whether Lord Penzance, as judge of the Arches Court of Canterbury, had the power to enforce obedience to his inhibition by significavit followed by a writ de contumace capiendo. This is a question of great importance. No express provision is made for it in the rules, but by rule 81 of the amended rules it is provided as follows: "In any particular not provided for by these rules the general practice of the Arches Court shall be followed as far as the same is applicable."

Now it is not denied that according to the general practice of the Court of Arches obedience to an order like the present is enforceable by significavit and writ de contumace capiendo, but it is said that in the absence of express provision in the Act of 1874 the judge has no such power; and, secondly, it is said that even if the judge would otherwise have had the power the 13th

(1) See 4 P. & D. 250. (2) See 1 P. D. 1.

section of the Act excludes it. I do not think either of these contentions is well founded.

By the 53 Geo. 3, c. 127, s. 1, it is enacted that in all causes which, according to the laws of this realm, are cognisable in the ecclesiastical courts, when any person who is required to comply with the lawful order of any such court refuses to pay obedience to such order it shall be lawful for the judge whose lawful order has not been obeyed to pronounce such person contumacious and in contempt, and to signify the same to His Majesty in Chancery as hath heretofore been done, and thereupon a writ de contumace capiendo shall issue from the Court of Chancery, &c.

Now it is not denied that the matter of the representation in the present case, and the proceedings consequent upon it, constituted a cause within the meaning of this statute, nor is it denied that in the absence of the 13th section of the Public Worship Regulation Act, 1874, the proceedings by significavit, &c., would have been regular and valid; but it is contended that by that section the legislature has provided special means for enforcing obedience to a monition, namely, by an inhibition against performing divine service, &c., and avoidance of the defendant's benefice if he does not, within three years, undertake to pay obedience to the monition; and consequently it is contended that the judge has no power to signify disobedience of the inhibition.

It is difficult to see any reason for such a contention. The expressed object of the Act of 1874 was to make further regulations for the administration of the laws relating to the performance of divine service according to the use of the Church of England. The defendant might have been proceeded against under the Church Discipline Act, 1840 (3 & 4 Vict. c. 86, s. 23), in which case it is not denied that, if the cause had been sent to the Court of Arches by letters of request, obedience to the orders of the judge could have been enforced by significavit and writ de contumace capiendo. The only difference between proceedings under that Act and the Act of 1874 is in the forms to be gone through in order to arrive at the same conclusion.

The manifest object of the Act of 1874 was to provide a more simple and speedy way of enforcing obedience to the laws of the Church with regard to the performance of divine service in

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churches and churchyards. It would, indeed, be strange if the legislature having provided means for attaining that end have enabled contumacious clerks to set the law at defiance for three years. Yet such would be the result if the judge cannot enforce obedience to his inhibition by significavit and writ de contumace capiendo.

Suppose a contumacious clerk were by writing under his hand, in the form prescribed by the Act and provided for by the rules and orders, to undertake pursuant to the 13th section of the Act that he would pay obedience to the monition and immediately afterwards disobeyed it, could it be contended that he could do so with impunity? I should think not; and if he could not, why should he be permitted to disobey the inhibition, and in so doing also disobey the monition for three years with impunity?

The proposition seems to me to be so monstrous and absurd, that, in the absence of express words prohibiting the judge from signifying the clerk's disobedience, I should hold that he is bound to signify it if required so to do by the complainants.

The inhibition is in the nature of an injunction in so far as it restrains the clerk from performing divine service until he undertakes to obey the monition; and surely if a court (more especially if it be, as the Court of Arches is, a court of record) has the power to grant an injunction it has the inherent power to commit for disobedience of it; the only difference between a temporal court and an ecclesiastical court being that a temporal court makes an order for committal at once and directly, whereas an ecclesiastical court has to proceed according to its laws and usages by signifying the contempt to the Court of Chancery, and that court thereupon issues a writ de contumace capiendo, by virtue of which the person in contempt is arrested and taken to prison, there to remain till he clears his contempt.

It is said that, if the legislature had intended to give the power of committing by means of a significavit and writ de contumace capiendo, they would have done so in express terms; the answer to this contention is, that the legislature had already provided for it in express terms by the 5 Eliz. c. 23 and 53 Geo. 3, c. 127, s. 1.

I abstain from repeating all the reasons given by the other

members of the Court for holding that the judge had the power which he has exercised. They seem to me to be unanswerable.

The last objection which I intend to notice is that taken to the delivery of the writ de contumace capiendo to the sheriff without it having been brought into the Court of Queen's Bench (now the Queen's Bench Division of the High Court), there to be opened and delivered of record to the sheriff, pursuant to the statute of 57 Geo. 3, c. 127, s. 1, which incorporated the 5 Eliz., c. 23, s. 2.

By the 2nd section of the 5 Eliz. the writ was required to be issued, and also made returnable in term time, and it was provided that after being made and sealed the writ should be forthwith brought into the Court of Queen's Bench, and there, in the presence of the judges, opened and delivered of record to the sheriff. By the 12 & 13 Vict. c. 109, ss. 26 and 27, it was enacted that the writ might be issued and made returnable in vacation. At the time when that Act was passed (namely, in 1849) the Court of Queen's Bench did not and could not sit in vacation. Hence it followed that by necessary implication the 2nd section of the statute of Elizabeth, and so much of the 1st section of the statute of 53 Geo. 3 as incorporated it, were repealed. It is true that the 26th section of the 12 & 13 Vict. has been repealed in part by the 38 & 39 Vict. c. 66, and as to the residue by 42 & 43 Vict. c. 59, but that repeal has not had the effect of reviving the enactments in question in the statutes of Elizabeth and George III.

For these reasons I am clearly of opinion that the provision in question in the 2nd section of the statute of Elizabeth was repealed, and that it has not been revived. But if the case were otherwise, I doubt, having regard to the preamble and some of the enactments in the Act of Elizabeth, whether the defendant could take the objection that the writ had not been brought into court, &c.; but it is unnecessary to decide that point. The result is that all the objections taken on the part of the defendant fail.

He must be remanded, and the several rules to shew cause which have been granted must be discharged with costs.

I cannot conclude without observing that I earnestly hope this case may lead clergymen, whose duty it is both to preach and to

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practise obedience to the law of the land, to consider well whether instead of breaking it they ought not to obey it, or, as good citizens and as a matter of conscience and duty, resign their benefices and become nonconformists. We live in perilous times —a wide-spread spirit of lawlessness is sadly on the increase; and it behoves all good citizens to do their utmost to uphold the law. Obedience to the law is the foundation of all rights, be they those of the Queen on the throne, or those of the poorest of her Majesty's subjects.

Four orders were accordingly made, viz., an order refusing to discharge Mr. Dale from custody; an order discharging the rule nisi for a certiorari; an order discharging the rule nisi for a prohibition, and an order refusing a supersedeas. Mr. Dale appealed from all these orders.

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Mr. Enraght, an incumbent, in whose case four similar orders had been made, appealed at the same time from those orders, and the appeals by Mr. Dale and Mr. Enraght were heard together. The cases were precisely similar, except in one point, which makes it necessary to refer to the form of the monition and inhibition issued in Mr. Enraght's case.

The monition, dated the 28th of August, 1879, commanded Mr. Enraght "to abstain and refrain for the future when officiating in your said church from using lighted candles on the communion table when the communion is being celebrated, or on a ledge immediately over the same during the celebration of the Holy Communion, when such lighted candles are not wanted for the purpose of giving light, and also from unlawfully wearing when officiating in your said church in the communion service, and in the administration of the Holy Communion, the vestments known as an alb, a chasuble, and a biretta, and also from, &c., &c., and also from unlawfully causing to be formed in your said church immediately before, but at the hour appointed for the commencement of, the prayers appointed to be read at morning service, and without any break or interval, and as connected with and being the beginning of and a part of the rites and ceremonies of public worship, and in the presence of the congregation assembled for

such service, a ceremonial procession, and from allowing such procession to proceed from the vestry to the choir stalls, a hymn being sung during the said procession, and also from all practices, acts, matters and things of the same or a like nature to those hereinbefore particularly set forth, or any of them, or from unlawfully permitting the same or any of them."

The inhibition dated the 9th of March, 1880, recited the monition and the service of it, and that Mr. Enraght "has failed to pay due obedience to the said monition in regard to the following matters (that is to say) by having at the early service on, &c., when he officiated in his said church, and in the administration of the Holy Communion used lighted candles on the communion table used at the said times or on a ledge immediately over the same during the celebration of the Holy Communion, and when such lighted candles were not wanted for the purpose of giving light; and also by having at the same services respectively worn a certain illegal ecclesiastical vestment other than and besides or instead of those appointed and allowed by law, to wit, a vestment known as a biretta, and also by having, &c., &c. And also by having permitted the Rev. W. Elwin or other his curate or assistant minister whilst officiating at the communion service, which took place thereat in the said church commencing at 10.30 A.M., on Sunday, the 16th of November, 1879, to wear certain unlawful ecclesiastical vestments, to wit, a vestment known as a biretta, and a vestment known as a stole, and also by having, &c., &c. And also by having suffered and permitted his said curate in the said service, between the conclusion of the prayers appointed to be read for morning service, and the celebration of the Holy Communion, and as connected with and being a part of the rites and ceremonies of public worship, and in the presence of the congregation assembled for such worship unlawfully to cause to be formed a procession consisting of acolytes, some of whom were dressed in blue and others in black cassocks, and all of whom wore white cottas with a processional cross and several banners, and of the clergy wearing coloured stoles, cottas and birettas, to proceed from the vestry down the south aisle, and up the nave of the church to the choir stalls. We do therefore humbly order that for such his disobedience, he the said Rev. R. W. Enraght be

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inhibited for the term of three months from the time of the publication of this inhibition, and thereafter until the same shall have been duly relaxed, from performing any service of the church, or otherwise exercising the cure of souls within the said diocese."

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As to the first point, all the proceedings subsequent to the issuing of the inhibition are irregular. Prior to 1840 ecclesiastical proceedings commenced in the diocesan courts, from which there was an appeal to the Court of the Province, i.e., to the official principal, or Dean of the Arches, though by letters of request the case might be sent at once to the provincial court. Those courts were not courts of record, and had no power to enforce their orders by imprisonment, their only remedy was excommunication. After a certain time the excommunication could be signified to the Court of Chancery, which issued a common law writ de excommunicato capiendo, the secular court thus giving assistance to the ecclesiastical courts: Phill. Eccl. Law, 1404, and the statute 53 Geo. 3, c. 127, substituting for this writ the writ de contumace capiendo. In 1840 the Church Discipline Act set up an entirely new tribunal to deal with criminal and other proceedings against clerks, and this is still the only criminal tribunal for the purpose, all criminal proceedings being withdrawn from the ecclesiastical courts. The 12th section of the Church Discipline Act shews that the legislature thought the new tribunal would not be able to enforce its decisions by significavit, for the section expressly provides that the Court may enforce its decisions in the same way as the ecclesiastical courts had formerly done. There is no such provision in the Public Worship Act. The

Public Worship Act established a wholly novel course of procedure and created an entirely new tribunal, and is confined to a limited class of offences mentioned in s. 8 of the Act, which may be called breaches of the ceremonial law.

[BRETT, L.J.:—These matters were within the former Act.]

Yes; proceedings can still be had under it with respect to them, and have been taken under it in some recent cases, but this Act appoints a new tribunal. The 7th section provides that the judge shall be a judge of the Provincial Courts of Canterbury and York, and when a vacancy occurs in the office of official principal of the Arches Court the judge is to become ex officio such official principal, and all proceedings thereafter taken before him are to be deemed taken in the Arches Court, and the inference is that, before the appointment of the judge as official principal, the proceedings were not in the provincial court, but only before the judge.

[JAMES, L.J. The Provincial Court of Canterbury is an ecclesiastical court. An additional judge of that court is appointed to assist the Dean of Arches till a vacancy, and then to become Dean of Arches. The words to which you refer only signify that after he becomes official principal the proceedings are before him in that character, not in his subsidiary character.

BRETT, L.J. They seem to be introduced only from abundant caution.]

Until the vacancy in the office of the Dean of Arches there was a judge of an entirely new tribunal, and he had no power to make use of the process of contempt under the Act 53 George 3, c. 127.

[JAMES, L.J. Do you say that during the interval the judge had no power to issue process of contempt to enforce the attendance of a witness?]

He had the power, because s. 9 of the Act gives the judge the powers of a court of record for such purposes. If the judge had the powers given by the Act of George III., this provision would have been unnecessary. The last step provided by s. 9 is the issuing of a monition. If the Act had stopped there it would have been imperfect, because the monition which the judge was empowered to issue was a purely statutory one, and he would

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have had no power whatever to enforce obedience to it: *Bartlett* v. *Kirwood.* (1)

[BRETT, L.J. It is to be "such monition, if any, as the judgment shall require." Why is it not to be the old ecclesiastical monition with its consequences?"]

Because this is an entirely new tribunal: *Serjeant* v. *Dale* (2); *Hudson* v. *Tooth.* (3) In *Serjeant* v. *Dale* (2) Mr. Justice Lush said that the new and special jurisdiction given by the Act to Lord Penzance was not enlarged by his having become official principal; and Cockburn, C.J., in *Hudson* v. *Tooth* (3) speaks of the proceedings being statutory proceedings in the Court of Arches.

[JAMES, L.J. He does not say there is a new tribunal; a new and special jurisdiction may be given to an old tribunal.]

A new court is created—a barrister of ten years' standing or an ex-judge may be appointed.

[BRETT, L.J. That is a new qualification for a judge of an old court.]

It is only on the happening of a certain event that the proceedings are to be deemed to be taken in the old court. In *Hudson* v. *Tooth* (3) it was argued that the judge having become official principal, could sit anywhere in the province. But the Court held that the office of the judge was an entirely new one, and that it was a mere accident that he was also Dean of Arches. The Lord Chief Justice expressly said the office was an entirely new one; and Mellor, J., said that the legislature did not improve or extend the jurisdiction of the Court of Arches, but created an entirely new tribunal. This view is borne out by the language of the Act. If the proceedings are only after the happening of a certain event to be deemed to be taken in the old court, how could they be in it before?

[COTTON, L.J. Was not the substance of *Hudson* v. *Tooth* (3) this, that as no proper place was named the party was not in default for not attending, and proceedings in his absence were void? But if the matter is rightly brought before the judge who is Dean of the Court of Arches, has not the judge all the powers of the Dean of Arches? It may be that before he succeeded to that office, he had not those powers.]

(1) 2 E. & B. 771. (2) 2 Q. B. D. 558, 566. (3) 3 Q. B. D. 46.

In proceedings under the Act before the judge became Dean of the Arches he could not enforce his orders by the process of significavit, and his becoming Dean of the Arches does not extend his powers of punishment for offences under the Act. The Act has provided a new mode of enforcing the monition, and there is no other. If the Act had stopped at s. 9, there would have been no mode given by it of enforcing the monition by the judge. It might have been enforced by indictment: *Reg.* v. *Walker*. (1) Sect. 13 says that the monition shall be enforced by inhibition. There is no consequence of disobedience to the inhibition as regards the person. There is a remedy by sequestration of the profits of the benefice.

[JAMES, L.J. Is the Act confined to persons having benefices?]

The Act is confined to incumbents. The inhibition is to be to an incumbent. The whole frame of the Act shews that only incumbents can be proceeded against under it; at any rate effectually.

[BRETT, L.J. The incumbent is defined by the Act as "the person legally responsible for the due performance of divine service." Would not a curate, in the absence of the incumbent, come within the definition? If so, he can be proceeded against under the Act, and as he has no benefice, there would be no means of enforcing that inhibition.]

In two classes of cases mentioned in s. 8 of the Act, the incumbent can be charged with permitting his curate to carry on the practices objected to.

[JAMES, L.J. Suppose the incumbent was abroad, and his curate acted without his consent?]

The bishop could withdraw the curate's licence, or the incumbent could dismiss him. But, probably, the curate could be proceeded against under the Act.

The effect of s. 13 is that, if the clerk goes on disobeying the inhibition for three years, or if he only refuses to consent to obey it, he is deprived of his benefice, without any further step being taken. There was no such inhibition as this known to the law ecclesiastical. There was under that law no inhibition, except to prevent a Court proceeding to enforce its sentence, pending an

(1) Law Rep. 10 Q. B. 355.

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appeal, and one which was provided under the Church Discipline Act, and that could not be enforced by significavit. This kind of inhibition is a complete novelty, it is a sentence, and a sentence of great severity.

[JAMES, L.J. Is it not rather in the nature of coercion than punishment; like imprisonment by the Court of Chancery for breach of an injunction or disobedience to some other order?]

It is an entirely new sentence created by statute.

[COTTON, L.J. The clerk has been committed for disobeying the inhibition, not for disobeying the monition. The monition and inhibition go to quite different things. He might obey the inhibition and yet lose his benefice for not submitting to the monition.]

That no doubt is so. The inhibition under the Church Discipline Act (3 & 4 Vict. c. 86), s. 14, is analogous, and it will not be contended that it can be enforced by process of contempt.

[JAMES, L.J. It is not an order of a Court.]

Sect. 17 of the Public Worship Act in relation to a cathedral or collegiate church, gives the visitor the same power as to the issuing an inhibition as is provided by the Act in other cases. It cannot be contended that an inhibition by a visitor could be enforced by significavit, and there would be an inconsistency if that process could be resorted to in the one case and not in the other. Then the last clause of s. 13 provides that any proceedings to enforce obedience to a monition shall be taken under the direction of the judge. If the bishop himself issues the monition, he issues the inhibition to enforce it, though the proceedings to obtain it can only be taken under the direction of the judge. The rules (1) assume a different construction of the Act, but that cannot alter the construction. The inhibition if made by the bishop could not be enforced by significavit, and the Act must have intended all inhibitions to stand on the same footing.

As to the statutes of 5 Eliz. c. 23, and 53 Geo. 3, c. 127, the present proceeding is not a cause within the meaning of the latter Act. Lord Coleridge in his judgment on this point overlooked the effect of the inhibition. All the judges of the Queen's Bench Division were much influenced by the consideration that

(1) 1 P. D. 1; 4 P. D. 250.

the disobedience might continue for three years. This by no means follows, for by the act of inhibition the clerk ceases to be the lawful minister of the church, and would be a "brawler" in the ecclesiastical sense of the word, if he attempted to minister, and could be proceeded against as such in the ecclesiastical courts, although in his own church: *Cox* v. *Godday*. (1)

[JAMES, L.J. He is still the incumbent; why can he not perform the ministrations by his curate?]

He ceases to be the lawful minister, and, indeed, cannot exercise the cure of souls within the diocese. But there would be a more effectual remedy if he were to attempt to perform service in the church during the inhibition; he could be removed by the churchwardens, and no action of trespass would lie: *Burton* v. *Kesbey*. (2)

[JAMES, L.J. I should advise them to think once, twice, and three times before they attempted to remove him. How can a man be a trespasser in his own church?]

There is a third remedy (under 23 & 24 Vict. c. 32, s. 2) by a proceeding before the magistrates, who could inflict a fine or imprisonment.

[JAMES, L.J. If an inhibited clerk performed divine service, whom would he molest?]

The nominee appointed by the bishop to perform the service.

[JAMES, L.J. As at present advised, I think, the Act might apply to interference with the bishop's nominee, if there was one, but we have not such a case before us.]

Moreover, the disobedience to the order would be a misdemeanor for which the clerk could be indicted, the order being made under a statute.

[BRETT, L.J. Disobeying a statute is a misdemeanor, and disobedience to some orders made under a statute may be a misdemeanor, but I am not aware that disobedience to every order made under a statute is so.]

Reg. v. *Ferrall* (3) supports the view of the appellants.

[JAMES, L.J. That was a case of disobeying the statute.]

There are many cases shewing that disobedience to orders made

(1) 2 Hagg. 138. (2) 10 M. & W. 105.
(3) 20 L. J. (M.C.) 39.

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under a statute is a misdemeanor, unless the statute provides another remedy.

The matter must be judged of as if Lord Penzance had not become the official principal of the Provincial Court of Canterbury; and that was the view of Lord Coleridge. The right way to construe the Act is to consider what the powers of the judge would have been before he became official principal. The words which make him official principal do not enlarge his statutory jurisdiction.

[JAMES, L.J. What meaning do you attribute to the words "shall be deemed to be taken in the Arches Court of Canterbury?"]

They shew that the proceedings were not considered to be in fact in the Arches Court, and they entitle the judge to command the services of the officers of that Court. He could not have done so before he became official principal. He would have used the services of the officers of the Court of the diocese in which the representation was made.

[BRETT, L.J. If the judge was directed to sit, not in that diocese, but in another part of the province, must the registrar of that diocese leave his own court and attend the judge elsewhere?]

The judge could not sit in the provincial court till he became official principal. This is a new tribunal and a new office.

[COTTON, L.J. I think s. 10 is against your argument. It seems to provide that the judge is to have the assistance of the diocesan registrar, because he is judge of another court.]

The argument is that the tribunal is new, the office new, the mode of appointment new, and the procedure new. The procedure may not be perfect, but the mere fact that the judge is to become official principal, and that the proceedings are to be deemed to be taken in the Arches Court is not enough to give by implication the power of issuing a significavit.

[JAMES, L.J. What is the difference between an inhibition and the old suspension ab officio?]

One difference is that the statutory inhibition is more limited. It is a suspension within the diocese. There being a new official principal, who obtains his office in a new way, it may have been deemed advisable that there should be an express enactment that the proceedings should be deemed to be taken in that court.

The second point is that the statutory formalities relating to the issue of the writ de contumace capiendo have not been complied with. In Mr. Dale's case the writ was tested on the 29th of October, which was not in Term-time, and it was never taken into the Queen's Bench Division and opened in the presence of the justices. Under the statute of Elizabeth, it ought to have been issued in Term-time, and also to have been opened and delivered of record in the presence of the justices. It was, in fact, only taken to the Crown Office. The statutory formalities must be strictly complied with. Phillimore's Ecclesiastical Law, p. 1410; *Le Roy* v. *Colgate* (1); *Anonymous* (2); *John Parker's Case.* (3)

[JAMES, L.J. In the present case the indorsement on the writ shews that it was brought into the Queen's Bench Division.]

That is not conclusive; the indorsement is not part of the writ. There are other cases which shew the reason why the writ was to be opened before the judges. In *Lucy* v. *Bishop of St. David's* (4), Chief Justice Holt said, "We are not to issue process here as instruments or conduit-pipes, but judicially, as judges." *Rex* v. *Fowler* (5), *Rex* v. *Theed* (6), and *In re Baines* (7), support the same view. The answer given by the other side is that the Petty Bag Act of 1849 (12 & 13 Vict. c. 109), has, by sects. 26, 27, and 28, repealed by implication the necessity for these formalities, by providing that writs may be tested and returned in vacation as well as in Term-time. But a special provision that judges should, in favour of the liberty of the subject, do a judicial act, cannot have been repealed by a general provision in an Act relating to practice only. The enactment that the judges must exercise their minds was not repealed.

[BRETT, L.J. The question may be whether under the Act of Elizabeth the writ was issued at all until it had been opened in court, and whether, as the Petty Bag Act says, the writ may be issued out of Term-time, that does not cover everything down to the issue.]

(1) Sid. 165.
(2) Cro. Jac. 566.
(3) Cro. Car. 582.
(4) 7 Mod. 56.
(5) 1 Salk. 293.
(6) 1 Str. 43; 10 Mod. 350.
(7) 1 Cr. & P. 31.

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The answer to that is that that Act refers only to the issue out of the Petty Bag Office.

[COTTON, L.J. I think it is a serious question whether the Act of 1849 does anything but regulate the practice of the Petty Bag Office.]

Sect. 26 of the Act of 1849 was in part repealed by the Statute Law Revision Act of 1875 from the coming into operation of the Judicature Act, and the rest of the section was repealed by the Act, 42 & 43 Vict. c. 59, as from the beginning of 1880. And the section has not been replaced. The repeal was made subject to a qualification the meaning of which it is difficult to understand, but it does not affect the statute of Elizabeth. The 26th section of the Judicature Act, 1873, abolishes terms for certain purposes, but not altogether.

The third point is, that the monitions and inhibitions are irregular in point of form. In the cases both of Mr. Dale and Mr. Enraght the objection is that whenever any Court is exercising a statutory jurisdiction, it must shew on the face of its sentence that the conditions precedent have been fulfilled, and that this has not been done, there being nothing on the face of the monitions or inhibitions to shew the jurisdiction of the judge, or that the necessary steps had been taken. It is not shewn that the accused had any notice of the proceedings, nor that the judge is the person authorized to act under the Public Worship Act, nor that he was proceeding under that Act. It is quite consistent with the forms used that the archbishop had never asked the judge to hear the case, or that any other of the statutory preliminaries had not been observed. The necessity of stating the circumstances essential to the jurisdiction is shewn by *Harrison* v. *Wright* (1), *Christie* v. *Unwin* (2), *Howard* v. *Gosset* (3), and *Reg.* v. *Hartley Wintney Union.* (4) Moreover, in the present case the Court is not properly a superior Court, for it is subject to prohibition. Therefore the argument is an a fortiori one. The instrument by which the Court acts is a monition, and for disobedience to it the inhibition is issued, and the principle laid down in the above cases must apply. The answer attempted is that the monitions

(1) 13 M. & W. 816.
(2) 11 A. & E. 373.
(3) 10 Q. B. 359.
(4) 1 Q. B. 677.

and inhibitions are according to the forms appended to the rules and orders issued under the Public Worship Act, the making of which was authorized by s. 19 of the Act. This is true with one exception—that is, in the title of the monition. But the question is whether the forms had statutory authority. Sect. 19 of the Act only authorizes the making of rules and orders relating to procedure, and provides that they shall be laid before parliament. There is no parliamentary authority to frame forms, and the forms therefore have no statutory authority.

[BRETT, L.J. The rules and orders have.]

Yes; but only so far as they are consistent with the Act. In *Hudson* v. *Tooth* (1), Lush, J., said he thought that, as the Act did not give authority to frame forms, the form was not binding on the archbishop. In the Judicature Act, the Common Law Procedure Acts, and many other Acts, express power is given to frame writs and forms, as well as rules and orders. The Probate and Divorce Acts do not, yet forms have been made under them; but probably those forms shewed jurisdiction, and were, therefore, good.

[BRETT, L.J. If the forms had been set out in the rules, would they not have been part of the rules? Is the setting out the forms in a schedule anything more than a method of drafting? I cannot conceive anything more necessary for regulating the procedure than to state the forms to be used.]

The two powers are distinct, and the forms would be no better for being set out in the rules.

In Mr. Enraght's case there is another objection, the inhibition includes more than the monition. The inhibition deals, not only with acts as to which Mr. Enraght has disobeyed the monition, but with other acts as to which he has never been admonished at all. The length of time for which the inhibition is inflicted is discretionary, provided that it does not exceed three months, and it is impossible to say how much of the sentence is to be attributed to the acts in respect of which he has been admonished, and how much to the acts in respect of which he has not been admonished, and the principle of the decision of the House of Lords in *O'Connell* v. *The Queen* (2) applies. Lord Coleridge

(1) 3 Q. B. D. 46, 58.

(2) 11 Cl. & F. 155.

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thought that this objection did not really arise, but, in fact, it does. The inhibition states that Mr. Enraght has disobeyed the monition (inter alia) by allowing his curates to wear a biretta and stole, and by having a procession between morning prayer and the communion service. A stole is not mentioned in the monition, and the monition did not prohibit any procession except a procession at the commencement of morning prayer. The sentence cannot be apportioned between the different acts. It is impossible to reject that which is not in the monition. If it is attempted to justify the inhibition on the ground that the acts were of a like nature, there ought to be a finding on the face of it that the acts were of a like nature. But they are not; there is no resemblance between wearing a stole and wearing a biretta, for a stole is not a eucharistic garment. So a procession may be lawful at one time and unlawful at another, and it cannot be inferred that the procession mentioned in the inhibition was illegal.

[BRETT, L.J. Is not the meaning of the monition that there is to be no procession as a part of morning prayer?]

Sir H. James, A.G., Sir F. Herschell, S.G., A. L. Smith, and *Danckwerts,* for Lord Penzance. The argument will be confined to the question as to the jurisdiction and the duty of the Court to issue and enforce the monition and the inhibition and to issue the significavit, and the particular question which arises in Mr. Enraght's case.

There are two questions of importance as to the jurisdiction of Lord Penzance—1, The power to enforce obedience to his orders by significavit; 2, The propriety of the forms used. As to the first point, Lord Penzance is a judge of an ecclesiastical court, and he has made a lawful order as judge of such a court in a cause which, according to law, is cognisable in such a court. There is nothing in the Public Worship Act which takes away from the jurisdiction of the judge as a judge of an ecclesiastical court. If he is not a judge of an ecclesiastical court it might as well be said he is not a judge at all.

For the purpose of the present cases it is immaterial what his position was before the vacancies in the provincial courts. But he is, in express terms, made by the Act a judge of the

provincial courts, even if his jurisdiction was at first limited to a particular class of cases, and it may be contended, if necessary, that from the commencement the judge had all the powers of the Court of Arches, of which he was a judge. The important question in this case is what was his position at the time when he issued the monitions and inhibitions in the present cases? He had become official principal of both the provincial courts, and had all the powers of those Courts. The appellants' counsel have failed to explain away the effect of the express provision in s. 7 of the Act that the judge shall be "a judge of the Provincial Courts of Canterbury and York," and of the provision that, after the judge should become official principal of the Arches Court of Canterbury, all proceedings taken before him in relation to matters arising within the province of Canterbury should be deemed to be taken in the Arches Court, and of the similar provision as to the Chancery Court of York. The reason for this provision was that for the first time there would be one judge of the two courts, which had previously been entirely distinct courts, and the object was to keep alive the distinct courts, though the judge had to be the same person. The argument of the other side comes to this, that though the legislature has said the judge shall be a judge of the provincial courts, he is not a judge of those courts, but of a new court created by the Act. No new court was created. It is a fallacy also to say that a new power was conferred on the bishop. He could only admonish. He was not a Court, and could not pronounce any sentence. It was not intended that he should inhibit. The rules under the Act shew that this is the true construction.

[COTTON, L.J. Can we look at the rules for the purpose of construing the Act?]

There is authority for that: *Ex parte Wier.* (1)

[COTTON, L.J. There is not here, as there was in the case of the Bankruptcy Act, any provision that the rules are to be deemed part of the Act.]

That was not given as the reason by MELLISH, L.J., in giving judgment, and s. 9 of the Public Worship Act, 1874, is material in this connection.

(1) Law Rep. 6 Ch. 875, 879.

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Then as to s. 9 the ecclesiastical courts had no power of enforcing the attendance of witnesses by subpœna, and the object of that section was to give the Court the ordinary powers of enforcing the attendance of witnesses and the production of documents which other Courts possessed. No inference can be drawn from that. The clause mentions certain things which the judge may do, and the bestowal of the powers of a court of record must be taken to be ad hoc. The main argument of the appellants is founded on s. 13.

[BRETT, L.J. You say it is the same Court, but is not a new jurisdiction given to it? Formerly the Arches Court was only a Court of Appeal, unless there were letters of request. Now does not the Act give original jurisdiction without letters of request?]

It is not a new jurisdiction, but only bringing the same business before the Court by a different channel. All these offences might have come before the Court of Arches under the Church Discipline Act. The process of bringing them there has been changed, and the remedy made more speedy and efficacious.

[BRETT, L.J. If an Act of Parliament were passed to give this Court in certain circumstances an original jurisdiction, not appellate, would there not be a new jurisdiction?]

The Court would have the same power of enforcing its orders. There would only be an extension of the jurisdiction to different objects. In the present case the subject-matter is the same; it only comes before the Court by a different method of procedure. Suppose appeals came to the Court of Appeal direct from a master, instead of going first to a judge in chambers and then to a divisional court, the jurisdiction of the Court would be the same. The appellants say that as the Act is silent as to the power of the Court to enforce its orders, therefore it has none. Nobody framing such an Act would think of inserting such a power. It is never intended that a Court shall merely pronounce judicial opinions which it cannot enforce. Even if the jurisdiction is a new one, still the Court must exercise it with its old powers.

[COTTON, L.J. The argument on the other side must, I think, go to this extent, that the jurisdiction is not given to the Court of Arches but to a new tribunal, presided over by the person who happens to be the official principal of the Court of Arches, that

the powers of such new tribunal must be founded on the Act alone, and that it is without the powers which ecclesiastical courts have by common law or statute.]

Then as to the argument that s. 13 shews affirmatively that the Court was to have no power of enforcing its orders, it comes to this, that the Act being one for the better regulation of public worship, and to enforce the conduct of public worship according to law, the legislature intended to give letters of licence to the clergyman to disregard the monition for three years, and to permit him to conduct public worship in an illegal manner for that period. That is an argument repugnant to the mind of any one who wishes to see the law properly administered, and especially with reference to the conduct of divine worship in a church. If the inhibition cannot be enforced except by deprivation, the incumbent might disregard it for three years, and there would be no remedy whatever, for if he officiated in another church with the permission of the incumbent, there would be no brawling. The argument makes the inhibition a brutum fulmen. So again there would be no brawling if the service was conducted by the incumbent's curate, for the bishop would not appoint a person to officiate, and so the objectionable practices might go on without check for the three years. As to enforcing the inhibition, the enactment in 53 Geo. 3, applies to disobedience to any order of an ecclesiastical court.

[BRETT, L.J. Could the monition be enforced by significavit?]

Perhaps it might, but the Court would probably say that the Act intended the monition to be enforced by an inhibition, and that an inhibition must issue before any further step could be taken. It is unnecessary here to maintain the opposite contention. Section 13 does not take away from the Court of Arches any of its powers. Inhibition is a lawful sentence of an ecclesiastical court, and is to be enforced as such, moreover it comes within the words of the Act 53 Geo. 3, c. 127. The inherent jurisdiction of the ecclesiastical court can only be taken away by clear words, and the power of issuing a significavit is as much an inherent power in an ecclesiastical court as the power to commit is in a court of record.

[BRETT, L.J. Suppose the Act had said that the inhibition

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should be enforced by fine, would not that, pro tanto, repeal the 53 Geo. 3 ?]

Anything which could be fairly construed as meaning that the inhibition should be enforced in a particular way and not otherwise would no doubt have that effect. Here the Act has said that the monition is to be enforced by inhibition, but does not say how the inhibition is to be enforced, it must therefore be enforced in the ordinary way. The Act provides that the inhibition must always be issued by the judge, because the judge has a power of enforcing it which the bishop has not. If the inhibition cannot be enforced, it might just as well have been left to the bishop to enforce the monition.

[BRETT, L.J. That view is confirmed by the fact that s. 13 speaks of "any proceedings" to enforce obedience to the monition, as if it contemplated more than one proceeding.]

Then as to the exceptions taken to the form of the monitions and the inhibitions as not showing sufficiently the jurisdiction of the Court: *Simpson* v. *Flamank* (1) is strongly in favour of the Respondent.

[JAMES, L.J., after consulting with the other Lords Justices, said that the Attorney-General need not trouble himself to argue that point.]

Then as to the particular objection taken in Mr. Enraght's case, that the inhibition deals with acts not mentioned in the monition, the monition was not to do certain specified acts, or any other acts of a like nature. This is admitted to be a good monition. The judge determines whether there has been a breach of his monition. It is not for this Court to sit as a Court of review, and the judge's determination is conclusive. It is not like *O'Connell's Case* (2), but more like a case of assignments of perjury. Even if the acts mentioned in the inhibition were not acts of a like nature, this would be a sufficient answer. But the best answer is that the new acts were of a like nature to those mentioned in the monition. The finding that the acts are of a like nature need not be on the face of the inhibition. A stole has been decided to be an illegal vestment, and nothing can be more clearly an act of a like nature than wearing one illegal vestment instead of another. Effect

(1) Law Rep. 1 P. C. 463.

(2) 11 Cl. & F. 155.

must be given to the general words, otherwise a clergyman who was admonished could go on continually changing one vestment for another, so as to necessitate new proceedings every time. There is no analogy between ecclesiastical and criminal procedure. The technicalities of the latter are not to be imported into the other.

Wills, Q.C., and *Jeune*, for the promoters. It is a mere question of words whether the court is a new one; provided it is shewn that it is a lawfully constituted ecclesiastical court, so as to be entitled to the benefit of the Act 53 Geo. 3, c. 127. For what purpose was Lord Penzance made a judge of the two provincial courts if he was not to exercise the powers of those courts? And when he became the judge of both courts the legislature provided that, notwithstanding the judge of both courts was the same person, the two courts should remain what they were before. Sect. 9 gives him power to issue a monition for costs. According to the argument of the appellants, the monition could not be enforced, except by the roundabout process of bringing an action. The legislature cannot have intended to leave matters on that footing, when there was a well-known process for enforcing such orders of an ecclesiastical court.

[BRETT, L.J. Suppose the court an absolutely new court, is it within 53 Geo. 3, c. 127?]

Certainly, the very fact that no express remedy is given shews that the legislature so intended.

[BRETT, L.J. What is your definition of an ecclesiastical court?]

A Court having general cognizance of ecclesiastical causes.

[BRETT, L.J. Suppose a new court instituted to try a certain class of causes of an ecclesiastical nature, is that an ecclesiastical court?]

Probably so, but it is not necessary to decide that, for when the Act says that the judge shall fill the well-known office of official principal, and that proceedings before him shall be deemed to be taken in the Arches Court, it is impossible to follow the argument that the tribunal so constituted is not the old court. That the procedure before him is a new one is immaterial. The argument that s. 13 by giving express powers impliedly repeals the general

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powers is at first sight more plausible, but the difficulty vanishes when it appears that no mode whatever is provided for enforcing obedience to the inhibition. Whether the inhibition is obeyed or not it cannot be relaxed until the written submission is made, and whether it be obeyed or not, deprivation follows if the submission is not made. The penalty of deprivation has nothing to do with obedience to the inhibition, and the only other penalty provided by the statute is the power of the bishop to appoint another clergyman to perform the services, and to charge his stipend on the profits of the benefice, which is a consequence, not of disobedience to the inhibition, but of obedience to it. The Act therefore imposes no penalty on disobedience to the inhibition, and the ground for implied repeal fails.

Then as to the question whether the writ de contumace capiendo has been properly issued in regard to the formalities prescribed by the Act of Elizabeth. The mischief intended to be remedied by that Act was this, that as the writ de excommunicato capiendo issued out of Chancery, the sheriffs were in the habit of neglecting their duty, and the object was to put the matter under the control of the Court of Queen's Bench, which had better machinery for compelling the due execution of the writ. The object was simply to make the sheriffs do their duty, and to render the writ more effectual.

[COTTON, L.J. May it not have meant, "we will make the execution of these writs more effectual, but, at the same time, our justices shall see that the writ is rightly issued?" Can we, after the decisions, hold that the formalities prescribed are not essential?]

In order to understand the case the history of the Queen's Bench must be looked to. In the year 5 Eliz. that Court only sat in term; it had no offices, and all its business was done before the Court in banc. Reeves' Hist. English Law, ed. Finl. 1869, iii. 166, and the first power given to the Court to try actions otherwise than in banc was given by a statute of 18 Eliz. If the provision, that the writ should be brought into court and opened there, had been a substantial provision for the benefit of the subject, it would be difficult to contend for its implied repeal by the Petty Bag Act. But when that which is provided

merely describes the only then existing way of recording the writ in the Queen's Bench, the case stands on a very different footing. The ministerial acts which are now done in the Crown Office were, in those days, actually done in court. This is illustrated by *Reg.* v. *Watson.* (1)

[COTTON, L.J.—The statute says the writ is to be brought into the Court of King's Bench, and then adds, "there in the presence of the justices" opened.]

At that day that was the only process which could be used. There is no trace of its ever having been brought to the attention of the judges what the writ was. The seal was put on it that it might not be tampered with by the party before it had become an effectual writ. It must be opened in order to be enrolled. The critical words are "delivered of record to the sheriff"—i.e., recorded in the Court of King's Bench, and then delivered to the sheriff.

[BRETT, L.J. If the words "in the presence of the justices" were struck out, everything that you say is to be done would still be covered.]

Those words come to no more than the common form "coram nobis." Corner's Crown Practice, p. 93, shews what the old practice was as to writs de contumace capiendo. If opening before the justices was the most material thing, it might have been expected that it would have been mentioned in the enrolment. But the only thing mentioned there is that the writ has been delivered of record to the sheriff. The inspection of the writ is so purely mechanical that it could not have been intended that the judges should attend to it. Then as to the cases referred to. *Anonymous* (2) is unintelligible, and does not shew the nature of the objection taken; non constat that the writ had been in the Queen's Bench at all. *Parker's Case* (3) only decided that as the writ had not been brought into the Queen's Bench at all it could not be executed. As to *Rex* v. *Colgate* (4), it is reported in a book of very small authority, but supposing it correctly reported it comes to nothing, for the objection there taken was that the writ had not been enrolled in the Queen's Bench. In

(1) 2 Ld. Raym. 817.
(2) Cro. Jac. 566.
(3) Cro. Car. 582.
(4) 1 Sid. 165.

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Lucy v. *Bishop of St. David's* (1), it is said that the judges are not to issue the writ as conduit pipes but as judges. That is so, but in the ordinary course of things the writ would not be looked at by the judges; their attention would only be called to it if the officer found that there was something requiring observation. The remark, too, was only an obiter dictum, without there having been any argument on the other side. The only point decided was that the writ must set out the form of the significavit. The direction that the writ shall be opened in the presence of the justices is merely a description of what took place in court, and did not constitute an essential requirement which must be literally and strictly enforced for the purpose of protecting the liberty of the subject. Though it is not necessary to go that length, yet even before the Petty Bag Act (12 & 13 Vict. c. 109), the opening of the writ in the Crown Office was by intendment of law equivalent to an opening of the writ before the justices in court, as many of the functions which were in old times performed by the clerks in court, whose office was abolished in 1843, by 6 Vict. c. 20, were by this time relegated to the Crown Office, which in this particular represented the Court for all intents and purposes. In old times, no doubt, the writ must have been returned in open court, as by no other means could the judges have been able to take cognizance of the cause. But that information is now just as effectually given and as readily available by recording the writ in the Crown Office or registry as by handing it up to the judges in open court, which would, in fact, be mere surplusage; and any objection to the validity of the writ at the present day, on the ground that it has been issued at the Crown Office in vacation is idle.

[BRETT, L.J. Are not the books full of cases in which, in favour of the liberty of the subject, writs have been set aside on the most technical grounds? Surely it is a principle of the administration of English law that any one who seeks in this country to imprison another must take care that he does it with the utmost possible regularity in every step of his process.]

That is so; but this is not a prescribed formality, but only a description of the practice of the court, having no bearing what-

(1) 7 Mod. 56.

ever on the liberty of the subject. What takes place in the Crown Office is by intendment of law the same as if it took place in the presence of the justices in court. Since the Petty Bag Act, it has been the regular practice to issue these writs in vacation as well as in term. *Rex* v. *Fowler* (1) only decided that the cause of excommunication must be set out in the writ. Then as to *Rex* v. *Theed* (2), if the object of requiring the writ to be opened in court was to inform the Court of the nature of the case, that information is just as effectually given by its being brought into the Crown Office. It never was intended that there should be a formal reading of the writ in court, so that the judges might at once exercise their discretion; if that had been the object, it would have been necessary to instruct counsel to move that the writ might be recorded. *Re Baines* (3) is hardly referred to as an authority against the Respondent.

[BRETT, L.J. Does not the Lord Chancellor seem to assume that if the writ were shewn not to have been opened in court that would be a fatal objection?]

The words as to the presence of the justices are not made of no effect by the present practice, but must be taken in a certain recognised acceptation, many things done in the offices being said to be done in court. By 6 & 7 Vict. c. 20 clerks in court were abolished, and by s. 16 powers were given to the judges to make rules as to the practice and business on the Crown side. Even supposing the words of the statute 5 Eliz. to be a substantive enactment, this section would authorize a regulation inconsistent with them, and the present practice of the office has therefore a legislative sanction. Then all distinctions as to the issue of writs in term or vacation were abolished by the Petty Bag Offices Act, 1849 (12 & 13 Vict. c. 109), ss. 26, 27, and as this is inconsistent with the former Acts, 5 Eliz., c. 23, and 53 Geo. 3, c. 127, it must be taken that those Acts have been pro tanto repealed, and that the necessity of issuing the writ in term-time no longer exists.

[JAMES, L.J. This particular writ was not to be effective till something had been done by the Court of Queen's Bench, but the

(1) 1 Salk. 293; Str. 106. (2) 1 Str. 43; 10 Mod. 350.
(3) C. & P. 31.

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Act does not in terms or by implication deal with the Court of Queen's Bench.]

An enactment which says that writs may be issued means that they may be issued so as to be effective.

[JAMES, L.J. The writ is issued as soon as it leaves the Petty Bag Office for the purpose of being taken to the Queen's Bench.]

No. It does not leave the hands of the officers of the Petty Bag Office till they hand it to the officers of the Queen's Bench.

[JAMES, L.J. This is an act relating only to the management of the Petty Bag Office.]

But s. 27 applies to writs returnable in any court. There are thirty-three cases between 1849 and 1857 in which writs were issued in vacation and made returnable during vacation for the arrest of persons under significavit, and of these only seven were issued after the Common Law Procedure Act of 1854, which first authorized sitting in vacation.

[COTTON, L.J. Does it appear whether any parties were actually arrested under them? If not, the validity of the writs could not be tried.]

It does not appear whether any arrests were actually made.

Then as to the difference between the monition and inhibition in Enraght's case, as to which *O'Connell's Case* (1) has been referred to. First, this is not a case of indictment, but even if it were, the case is more like a case of perjury, where if some assignments are good the sentence will be supported, though others may be bad; or a case of slander. There is only one offence—disobeying the monition; and if that is established, a sentence for it is valid. Apart from this, the monition warns the clerk not only against doing the acts specified, but any similar acts. Wearing one illegal vestment is a similar act to wearing another. It is contended that you cannot intend that the judge has exercised his judgment and determined that the act is of a similar nature when he has not said so; but the inhibition, on its true construction, involves a finding that the vestments are illegal vestments, and that the wearing them is an act of a similar character. So as to the processions, the monition was directed against processions so connected with the morning service as to form a part of it.

(1) 11 Cl. & F. 155.

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Charles, Q.C., in reply. The statute 5 Eliz. c. 23 prescribes in unambiguous terms the course to be pursued in the delivery of the writ to the sheriff. There is high judicial authority shewing that the words were inserted for a purpose, and had a specific meaning, and the counsel for the promoters have failed to shew that from the time of Elizabeth down to 1849 any deviation from the proper form has ever been allowed. The Act expressly provides for the writ being opened before the justices in court; there is no similar provision as to the return. The cases which have been cited from the practice books merely shew that the return to the writ may be good if made in the Crown Office. The words of the Act, "opened in court in the presence of the justices," are precise, and point to something very different to a mere opening before the clerks in the Crown Office, and the promoters were driven to contend that these words, "opened in the presence, &c.," were mere surplusage. The Court is here dealing with a statutory penal writ, which is to be issued in a particular manner, and must see that the Courts Ecclesiastical do not interfere with the rights of the subject by disregarding the formalities attending the issue of the writ which have been imposed by statute. It was said that the Petty Bag Act has by necessary implication repealed the earlier Acts; but where is that necessary implication to be found? It is only an Act for regulating the practice of the Petty Bag Office, and the provisions of 53 Geo. 3 for the liberty of the subject are not to be held repealed without plain words or necessary implication. With respect to the returns of writs issued by the Petty Bag Office in vacation time since 1840, it is not shewn that any one was ever actually imprisoned under a writ of significavit issued in vacation. Most of the writs were for costs or alimony, and probably payment was made without arrest.

Then as to the power to issue a significavit, the effect of the Public Worship Act was to create a new tribunal, a new jurisdiction, and a new procedure, and Lord Penzance was not in the same position nor armed with the same powers and authority as the Dean of Arches under the old procedure, and, consequently, cannot enforce his orders by the process formerly available in the Arches Court. When the Public Worship Act was passed

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the Arches Court had no jurisdiction except as in a Court of Appeal.

[COTTON, L.J. The Bill of Citations, 23 Henry 8, c. 9; Phill. Eccl. Law, 1883, seems to shew that the Court had original jurisdiction, though that statute restrains the exercise of it.]

At all events from the time of Henry VIII. downwards the procedure in the Arches Court was by appeal or by letters of request only, and the Dean of Arches was not a judge of first instance. Then the Public Worship Act appointed a new judicial officer, who, according to the opinion of the judges in *Hudson* v. *Tooth* (1), has a new jurisdiction. Now whenever a new procedure is created by Act of Parliament, even though vested in a known court, the former procedure cannot be resorted to for the purpose of enforcing orders under the new procedure, unless the Act of Parliament which creates the new jurisdiction authorizes the Court to use its old powers as to the new procedure. An illustration of this is to be found in the Companies Act, 1862, which gave to the Court of Chancery a new jurisdiction to be exercised in a particular class of cases in a particular manner, but with the express proviso (s. 120) that all orders made by the Court of Chancery under the Act might be enforced in the same manner in which orders of that Court made in any suit pending therein might be enforced. This being a new statutory procedure from first to last and the mere creation of the Public Worship Act, orders made under it cannot, in the absence of any provision in the Act to that effect, be enforced by any of the forms of process exercised in the old Court of Arches. The definition of an ecclesiastical court, that it is a court which takes cognizance of ecclesiastical causes is far too wide. Church-rates are an ecclesiastical matter, and the cognizance of questions upon church-rates has been committed by 7 & 8 Wm. 3, c. 34, in certain cases to justices of the peace. Surely they are not an ecclesiastical court.

[BRETT, L.J. What is your definition of an ecclesiastical court?]

To give a satisfactory definition is difficult, but the mere fact of taking cognizance of ecclesiastical causes does not make a court

(1) 3 Q. B. D. 46.

an ecclesiastical court. It has been argued that the monition can be enforced by process of contempt, but the 13th section is imperative, and under it the monition can only be enforced by inhibition.

[BRETT, L.J. Does an affirmative enactment take away old powers?]

Where the Act says "shall be enforced" in a particular way, it means in that way and in no other. As to the nature of the inhibition, it is a new kind of order not having the incidents of an order made by the Arches Court. The true construction of s. 13 is that the same person who issued the monition must also issue the inhibition. Till we come to the last clause of s. 13 there is nothing expressly stating who is to issue the inhibition, and the natural construction is that it is to be issued by the authority which issues the monition. Sect. 17 confirms this. The visitor is placed in the same position as the bishop, and then reference is made to his having the same power as to inhibition as the bishop, whereas according to the respondent's argument the bishop has no power as to inhibition. The last part of the clause is insufficient to control this.

[BRETT, L.J. According to your argument we should expect the last part of the section, instead of saying "shall be taken by direction of the judge," to say "shall be taken before the bishop or the judge as the case may be."]

If the Act meant that the inhibition should be issued by the judge, it would have said "shall be taken before the judge." The statute then directs that obedience to the monition shall be enforced by inhibition, which need not in every case be issued by a Court, and there leaves the matter.

[BRETT, L.J. Is it not the meaning of s. 13 that, as the bishop cannot issue a significavit of his own authority, the judge shall do it for him?]

No. The rules and orders assume that construction of the Act, but those rules and orders are not of the same authority with and cannot contravene the Act.

Then, upon Mr. Enraght's case, the objection to the inhibition here is not merely technical, but is emphatically one of substance. The charge against Mr. Enraght was that he had worn certain

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unlawful vestments—to wit, an alb, a chasuble, and a biretta. The particulars had to be given to enable him to know what he was charged with, more especially when the legality or illegality of particular vestments is a matter of so much controversy. He was tried and found guilty on that charge. He is brought into court to meet the charge of having broken the monition, which was pointed to those acts, and then is punished by inhibition, followed by imprisonment, for, among other things, allowing his curate to wear a stole. There has been no disobedience to the monition as to the alb and chasuble, and no judgment was ever pronounced against him as to the use of the stole. The sentence must be considered to be in part attributable to the stole, and it is impossible to say how much of the sentence is to be attributed to the acts, in respect of which he had been admonished and disobeyed the monition, and the act in respect of which he had not been admonished (wearing the stole). On the principle, then, of *O'Connell's Case* (1) and *Campbell* v. *The Queen* (2), the inhibition is bad for uncertainty, and cannot be supported. The judge may have thought that one offence deserved suspension for a day and the other for the remaining two months and twenty-nine days.

[COTTON, L.J. Is it a sentence? Is it not merely a means of compelling him to submit to the monition?]

It has all the character of a sentence, the period being within the discretion of the judge, except that it is not to exceed three months.

JAMES, L.J. The main question, or, at least that which has been treated as the main question, in this matter is whether the inhibition granted by the Dean of Arches in Mr. Dale's case, and the similar inhibition in Mr. Enraght's case, can be enforced by process of significavit and writ de contumace capiendo. Upon that question I have not been from the first able to entertain any substantial doubt. In compliance with the provisions of the Public Worship Regulation Act, Lord Penzance was appointed by the joint appointment of the Archbishop of Canterbury and the Archbishop of York to be a judge of the provincial court of the

(1) 11 Cl. & F. 155. (2) 11 Q. B. 799–814.

one and a judge of the provincial court of the other. A good deal has been said to us as to what was the effect of the appointment in the first instance, but, according to my view of the case, that is a matter of speculative history not very material or very relevant to the question that we have to consider. My own opinion is, that by the very words of the Act of Parliament the judge appointed was not so appointed as to make a distinct or new tribunal, but that he was a judge of the Arches Court of Canterbury and a judge of the Chancery Court of York—an additional judge to the then existing judges—with a right of succession to the then existing offices, and that his court was a divisional court of each of the old courts. But that does not seem to me to be very material, because the Act goes on to say that upon the vacancy of the office which was then filled by Sir Robert Phillimore, the judge appointed under the Act shall become official principal of the Court of Arches. Upon that event happening, it appears to me to be plain from the express words of the Act, that Lord Penzance became the lawful successor of a long roll of eminent men who have from time immemorial filled the office of official principal of the Arches Court of Canterbury. Upon his succeeding to that office, his character—whatever it was, whether as a distinct judge or an additional or extra judge—became, so far as related to matters arising within the province of Canterbury, merged and absorbed in that of Dean of Arches; and the court which he was authorized to hold before for matters arising within that province — whether it was an extra court, or a divisional court, or an independent court, or a separate court—became absolutely merged in the old, original Court of Arches. By way of making this quite clear, the Act goes on to say that after he succeeds to the office all proceedings thereafter to be taken before him in relation to matters arising within the province of Canterbury "shall be deemed to be taken in the Arches Court of Canterbury." I, in obedience to the Act of Parliament, do accordingly deem these proceedings to have been proceedings in the Arches Court. They are then proceedings of the Arches Court, and the monition pronounced in this case and the inhibition which followed were, therefore, a monition by the Arches Court and an inhibition by the Arches Court. That

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being so, it seems to me to follow as a plain matter of course that the monition of the Arches Court, and the inhibition of the Arches Court, were a monition and an inhibition having all the incidents and consequences of any other lawful order of the Court of Arches. One of those consequences and one of those incidents was that a lawful order of the Court of Arches could be enforced by significavit, upon which significavit a writ de contumace capiendo could be issued. That seems to me to follow as a matter of course, unless there be something in the Act of Parliament to deprive those orders of their ordinary legal consequences. Now, with regard to the monition, it may be argued—it is not necessary for the purpose of to-day to consider whether it can be argued effectually—that obedience to a monition is to be enforced only by an inhibition. I say it may be argued; I myself think that it may be a point of very grave doubt whether the words "shall be enforced if necessary by an inhibition," mean shall be enforced by an inhibition and in no other manner. Assuming, however, that such is their meaning, an inhibition has been issued to enforce the monition, and the Act does not go on to say how the inhibition is to be enforced. It therefore follows, as it seems to me, of necessity that the inhibition is left to be enforced according to the rules of law applicable to inhibitions of the Court of Arches. It is said that the Act has provided a mode for enforcing the inhibition—viz., that if the inhibition remains in force for more than three years the living is to become void. But that has nothing to do with enforcing obedience to the inhibition. Avoidance of the living is the result of default in undertaking to comply with the monition, and if such default is made the living is avoided whether the inhibition has been obeyed or not. If there is no submission within the three years the living is avoided but the inhibition still remains in force, and prohibits the clerk from officiating within the diocese. That being so, it appears to me that the inhibition is an inhibition with its ordinary legal consequences, one of which is that there should be the process of coercion which has been resorted to in this case.

It was strongly urged that this was a new jurisdiction and a new procedure. According to my view of the case, that is not material, because if a new jurisdiction is given to an existing

Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if that jurisdiction be so given to a well-known court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressed or plainly implied, be given to that court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance. But I am satisfied that in this case no new jurisdiction was given to the court, assuming it, as I hold that it is, to be the Court of Arches. The Court of Arches always had jurisdiction to deal with these matters; it always had jurisdiction to deal with these persons. The mode of bringing the matter into the court and the mode of dealing with the matter when it is in the court are matters of procedure and process, and not matters of jurisdiction. That seems to me to dispose of the objection to the jurisdiction of Lord Penzance so far as regards the case of Mr. Dale.

Another point has arisen upon the appeal of Mr. Enraght—that is, whether the inhibition itself is not in excess of jurisdiction by reason of the alleged departure from the words of the monition; and there it seems to me that there was more ground for doubt and for the argument that has been addressed to us. In the monition certain vestments are ordered not to be worn, but the monition, in accordance with the well-established and reasonable practice of the ecclesiastical court, goes on to say that the clerk is not only to discontinue certain things, but is not to do any other things of the same or a like nature. Those words were put in in order to prevent colourable variations, which could easily be resorted to if some such addition was not made to the sentence. Whether the monition with those words has been violated is, it seems to me, a question of fact, to be tried by the bishop or the judge who has issued the monition. It is a question of fact which he has to determine whether the person who is charged with disobeying the monition has disobeyed, either in regard to the specific things mentioned, or in regard to other things coming within the clause forbidding things of the same or a like nature. Now, whether the use of a stole is a thing of the same or a like nature within the meaning of the monition is, it seems to me, a question, not of jurisdiction, but of fact, which the proper judge of

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the facts has to determine. It seems to me to be very important that we, who are sitting merely as a court of prohibition, should be most careful not to attempt to draw within our net, as a Court of Appeal, the question whether the use of a stole was an act of the same or a like nature which the Acts expressly prohibited. It was suggested that there was no appeal from the decision of the judge on this point, but I should not like to say that there was not. I am disposed to think that an appeal would lie, but that is a matter with which we have at present nothing to do. Either there is an appeal or there is not. If there is an appeal, that is the proper remedy. If there is not an appeal, that is a casus omissus in the Act of Parliament, and we cannot enlarge our jurisdiction as a court of prohibition because there is not sufficient and proper machinery to deal with the question by way of appeal, where it clearly is, according to my view, a question of appeal and a question of appeal only—that is, as to whether the conclusion in point of fact has been rightly arrived at, and whether the judicial discretion has been properly exercised. That seems to me to dispose of the question which is peculiar to Mr. Enraght's case.

There remains to be disposed of the question whether the appellants are entitled to be discharged from custody, by reason of there being a miscarriage in the mode in which the writ of capias has been dealt with. Upon this point I find myself unable to concur in the judgment of the Queen's Bench Division. The judges of that Division all expressed their opinion that, if it were not for the Act for regulating the procedure of the Petty Bag Office, the objection must prevail, and in that I agree. I think they were well founded in the conclusion, that, having regard to the words of the statute 5 Eliz. c. 23, and to the decisions of many eminent judges upon that statute, it was not a matter of form, but a matter of substance, that the writ which was issued from the Petty Bag Office should be brought into the Queen's Bench and opened there in the presence of the justices, in order that the mind of the Court might, if necessary, be addressed to it to see whether it was such a writ as the Court of Queen's Bench would take upon itself to execute. They were not, as has been said, to issue process as mere instruments or conduit pipes, but they were to exercise their own judgment

judicially as judges, and it was therefore enacted that the writ should be brought into court and opened in court—not with a view that in every case it should be read by the judges or read to them, but that the officer reading it might be enabled immediately to take the opinion of the judges, if he thought there was anything upon the writ which required to be considered, or which might cause the Court not to adopt it or be instrumental in enforcing it. Another reason might be that when the Court was sitting the defendant would have an opportunity of applying at once to the Court for relief, in case there should be any miscarriage or error in the proceedings commenced against him. But, whatever may be the reasons, whether good or bad, we have the decisions of a succession of judges upon the statute of Elizabeth to the effect which I have mentioned. Then came the Act 53 Geo. 3, c. 127, which in effect re-enacts that part of the statute of Elizabeth. Although the purpose for which the statute of Elizabeth is said to have been passed was the giving greater security for the enforcement of the writ de excommunicato capiendo, the Act 53 Geo. 3, c. 127, in providing that there should be a writ de contumace capiendo, instead of de excommunicato capiendo, enacted that the substituted writ should be obtained and dealt with in exactly the same manner as the old writ was, and that the provisions contained in the Act of 5 Eliz. c. 23, should extend and be applied to it, as if they were therein repeated and enacted. Now where the words of an old statute are either transcribed into or by reference made part of a new statute, it is a rule of construction that this is done with the object and intent of adopting any legal interpretation which has been put upon them by courts of law, the same words being used in order that everything that had been settled before as to their construction should remain settled without fresh litigation. According to my view, it was, at the time when the Petty Bag Office Act, 12 & 13 Vict. c. 109, was passed, an essential part of the proceedings as to the significavit that the writ should be brought into the Court of Queen's Bench while the judges were present sitting there. The Act relating to the proceedings of the Petty Bag Office did not certainly in terms, nor, as it appears to me, by any plain implication, or any implication at all, alter that which was required

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to be done in and by the Court of Queen's Bench. The writ may be issued out of term, the writ may be returnable out of term, because these are things which are to be done in the Petty Bag Office. But, as it appears to me, there is nothing in the Petty Bag Office Act which, either in express terms or by implication, interferes with that which was to be done by the officers of the Court of Queen's Bench in the presence of the judges of that court, and which, according to the decisions, was a matter of substance. Everything in the Act 53 Geo. 3, c. 127, can have effect given to it without in any way interfering with the provisions of the Petty Bag Office Act. It may seem to be a very idle thing to attach weight to the question whether the writ is opened in court or in the Crown Office in the Temple; but it may, perhaps, not be more idle than the whole question before us. By law a man is forbidden to wear a particular vestment. By law the writ ought to be opened in a particular place, and before particular persons. If one law is to be obeyed, the other law is to be obeyed also, and I am of opinion that the writ was defectively issued from the Court of Queen's Bench after it had left the Petty Bag Office, and, that being so, that Mr. Dale is entitled to be discharged from that writ, that having been improperly issued, and the consequence will follow, with respect to Mr. Enraght, that he will be entitled to his rule for a habeas corpus in order that he may also be discharged.

BRETT, L.J. Under ordinary circumstances in such a case as this we should have preferred to carefully prepare our judgment, but this being a case in which the liberty of the subject is concerned, it ought to receive the immediate decision of the Court if possible; and as we have now had our minds directed to it for five days, and have been assisted by arguments as careful and as able as could have been brought before the Court, we have thought that we ought to give an immediate judgment.

The matters before us are brought under two distinct heads, the one being whether a prohibition ought to go on the ground of excess of jurisdiction; and the other whether, supposing there has been no excess of jurisdiction, we ought not to order the release of one or both of these gentlemen, on the ground of there having

been an irregularity in the way in which the jurisdiction of the Court has been exercised.

As regards the prohibition the question is whether there has been an excess of jurisdiction, by reason of Lord Penzance having signified contumacy to the Court of Chancery, and thereby having obtained the writ de contumace capiendo. It is alleged by the appellants that in cases conducted under the Public Worship Act (37 & 38 Vict. c. 85) the judge can in no case signify the matter to the Court of Chancery so as to obtain the writ; and it was further urged that, even if he could do it in some cases, there was an excess of jurisdiction in his doing so in the present case, because the monition and inhibition were so drawn up as to be void, and that he exceeded his jurisdiction in signifying the matter to the Court of Chancery upon void documents.

The argument of the appellants on the latter point turned upon the question, whether the judge was bound to shew upon the face of the monition and inhibition many things which were said to be necessary in order to found his jurisdiction. We are all of opinion that he was not bound to shew upon the face of these documents the grounds of his jurisdiction in the way contended for. I should have thought so upon the ground which I shall have presently to discuss, viz., that the court in which he was sitting and of which he was the judge, is not a new court but the old Court of Arches, and that the Court of Arches, although it is a Court with a limited jurisdiction, yet is not a Court of inferior jurisdiction, but is for cases of this nature a Court of superior jurisdiction, and is not bound to shew upon the face of its documents the grounds of its jurisdiction. But I also think that even if it were not so these documents were drawn up in proper form, having been drawn up in the form given in the rules and orders made by virtue of the statute. I am of opinion that the rules and orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before parliament for a certain time, and if not objected to they are then to be binding. Wherever that provision is introduced into an Act of Parliament it seems to me that the rules and orders, if not objected to by parliament, become part of the statute. It was urged that though

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the rules and orders might be part of the statute the forms were not. In my opinion the forms are part of the rules and orders, they are referred to in them, and the mere fact of their being put into a schedule, instead of being embodied in the rules, is a mere question of drafting. The forms, therefore, are part of the rules and orders which have statutory authority; these documents have followed forms having that authority, and even, therefore, if they might otherwise be insufficient they are made sufficient by the statute.

The main and substantial question is, whether this is or is not the old Court of Arches. It is argued not only that it is not the old Court of Arches, but that it is a new court which is not an ecclesiastical court at all. After having listened with all the attention I could, and after having tried to sift and understand the argument, it seems to me as clear as possible that this is the old Court of Arches, and nothing but the old Court of Arches, and that there is no reasonable ground for contending that any new Court, whether ecclesiastical or lay, was established by the Act. From the time of Lord Coke there had been two provincial courts—those of the provinces of Canterbury and York, both of which bore the names of Provincial Courts, but each of them had another name, the former being known as the Court of Arches, and the latter as the Chancellor's Court of York. Anybody wishing to speak of the two courts at the same time would naturally use the name which was common to both, and instead of saying the Court of Arches and the Chancellor's Court of York would call them the Provincial Courts of Canterbury and York.

Now an Act of Parliament is to be construed according to the ordinary use of the English language, unless there is in it something pointing at a different construction. In s. 7, which contains the first mention of courts in the Act, the framer of it has used the words which according to the ordinary modes of expression he would use if he wanted to describe the old courts of Canterbury and York. If this were a new court it would hardly have been called a provincial court, a new name would have been given to it, but at all events it must have been called "a" provincial court not "the" provincial court, which necessarily refers to something already existing. Sect. 7 enacts that the

Archbishop of Canterbury and the Archbishop of York may appoint a person having certain qualifications to be a judge of what? A judge of the Provincial Courts of Canterbury and York. That seems to me to make him a judge of both provincial courts, that is to say, of the Provincial Court of Canterbury and of the Provincial Court of York, in other words, of the Court of Arches and of the Chancellor's Court of York. But there is more than that. The Provincial Courts of Canterbury and York had existed for centuries; they were courts with judges appointed by the archbishops respectively; they had certain officers, they had certain seals, and they dealt with certain subjects. After this Act of Parliament was passed, the same officers were the officers to carry out the decision of the judge, the same seal was used, the same subjects were entertained; and there is nothing in this statute from the beginning to the end which can be suggested as instituting any court at all, unless it can be said that the mere enabling the archbishops to appoint a particular person makes a new court. Not only, therefore, does the name seem to signify the old court, but the fact that no new officers are appointed, that no new seal is provided for, that no new court is named, and that the same persons are to appoint the judge as appointed the judges of the old provincial courts, though they must do it by appointing the same person to both courts, seems to me conclusive to shew that the statute intended the judge to be a judge of the old Provincial Courts of Canterbury and York.

It was urged in opposition to this view, that the court must be a new court, because the qualification of the judge was different. I cannot attribute the slightest weight to such an argument. Then it was said that it was a new court because the procedure is a new procedure. But an enactment which merely lays down a new procedure, as to matters which were before within the jurisdiction of the Court, cannot possibly make the court a new court.

Then it is said that it was a new court because a new jurisdiction was given to it—viz., a jurisdiction of first instance—whereas, the jurisdiction of the old Court of Arches was only an appellate jurisdiction. That objection seemed to me at first sight to be formidable. It was said further, that even if the Court had previously an original jurisdiction under letters of request, yet,

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inasmuch as the Act gives the Court power to act without letters of request, that is a new jurisdiction. I think, however, that these objections are sufficiently met by the consideration that the jurisdiction of the Court of Arches to deal with ecclesiastical offences existed quite independently of the letters of request, that the letters of request were only a mode of procedure, and that the Court had, by reason of its inherent and original jurisdiction, power to deal with all the cases provided for by the Act, and that the mere fact of taking away the necessity of letters of request is a mere alteration of procedure, and is not the giving of a new jurisdiction.

Then it was said that we ought to collect from the terms of the statute itself that it was intended to give a new jurisdiction, and much reliance was placed upon the words of the 7th section, which say "that all proceedings thereafter taken before the judge in relation to matters arising within the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury;" and so with respect to the court of York. It was urged that where the statute says that you are to deem that certain things shall be, it assumes that in point of fact they are not so, and that therefore those who drew this statute were of opinion that this court was in reality not the Court of Arches, but that matters which were brought before it under this statute were to be deemed to be in the Court of Arches. But I am of opinion that, according to the true interpretation of these words, they only mean that, inasmuch as the court may happen to be held neither within the province of Canterbury nor the province of York, it is provided that, wherever it sits, all matters coming before it which arose within the province of Canterbury are to be considered as in the Court of Arches; whereas all matters coming before it which originate within the province of York are to be considered as within the Provincial Court of York. It was said that this must have been a new court before the vacancy, and that therefore it must be a new court after the vacancy. Now if the first of those propositions were true, it does not seem to me that the second is a consequence from it; but it seems clear to me that it was neither a new court or a new jurisdiction before the vacancy. I cannot accede to the view that the giving power to appoint a

new judge or an additional judge alters the court or the jurisdiction. Power is given to appoint an additional judge to a court in order that he may exercise the jurisdiction of that court; and it seems to me that as soon as the new judge was appointed, even before the vacancy, he was an additional judge of the Provincial Courts of Canterbury and York, though his power was confined to certain of the matters over which those courts had jurisdiction. Then it was said, that even supposing this to be the Court of Arches and the Court of the Province of York, yet nevertheless a new jurisdiction was given within that court, because the court was enabled to do things which it had previously no power to do—as, for instance, to issue the inhibition which is mentioned in the 13th section. The proposition therefore is, that wherever an existing court is enabled to do something which it could not do before, that is a new jurisdiction. In my opinion that is an incorrect proposition. If the court is dealing with matters which were before within its jurisdiction, but is only enabled to deal with them in a new way, it seems to me that there is not a new jurisdiction, but only a new procedure, and I am of opinion that in the present case there is no new jurisdiction, but only a new procedure.

Then it was contended that, supposing it only to be a new procedure, it is an exclusive procedure with regard to the matters to which this statute relates, a new procedure which is to take the place of all the old procedure, and therefore by implication to take away the power of the Court to deal with any matter according to its old procedure. I do not doubt that the legislature would have power to do that; but the question is whether it has so done; and inasmuch as all the enactments with regard to the procedure here are affirmative, I should say that a new procedure thus enacted can only be substituted for, as distinguished from being added to, the old procedure, when it is made clear that it is so intended, and that such intention is not made clear in this statute. With regard to the power of enforcing a monition made under this statute, though such a monition might formerly have been enforced by significavit, I am strongly inclined to the opinion that the 13th section here does substitute the procedure specified in it for the power of signifying the disobedience of the monition. But that is not sufficient. The appellants must also shew

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that the power of enforcing the inhibition in any way not mentioned in the section is taken away. Now it appears to me that the statute provides no means at all of enforcing obedience to the inhibition, and that it therefore cannot be enforced at all unless it can be enforced by means of the old inherent powers of the court. There is, therefore, no new process substituted for an old one, and it seems to me to follow that, though in my opinion the monition must be enforced by inhibition, yet the old process of the court for enforcing any of its orders exists for the purpose of enforcing obedience to the inhibition. I am of opinion, therefore, that the application for a prohibition fails, and that everything which was done by Lord Penzance in Mr. Dale's case was done correctly within his jurisdiction.

With regard to Mr. Enraght's case, it was contended that the significavit was without authority, because the inhibition mentioned grounds not included in the monition, and that, inasmuch as the inhibition inhibits Mr. Enraght from exercising the cure of souls for a certain time which it is within the discretion of the judge to name, if that inhibition is made to depend upon matters, some of which are not mentioned in the monition, the inhibition is void, by analogy to the decision in *O'Connell* v. *Reg.* (1), and I confess that, if it could have been shewn that the length of the term of inhibition must have been determined with regard to a matter which was not within the monition, I should have thought that the analogy did apply, and that the inhibition could not have been supported.

Now I must own that I thought at first that Mr. Enraght had strong grounds for saying that upon the trial the question of the stole cannot have been brought forward, because the monition did not mention it, whereas the inhibition recites it as one of the grounds upon which the inhibition is rested, and that there was a strong argument therefore for saying that the inhibition had gone beyond the monition. But the monition not only prohibited certain specified acts, but all other acts of the same or a like nature, and this raises the question whether upon prohibition we can say that the inhibition has gone beyond the monition. If we had been hearing an appeal from the order of Lord Penzance I should have

(1) 11 Cl. & F. 155.

doubted whether the inhibition ought not to have been corrected, but upon a question of prohibition it seems to me that we are unable to say that the allowing the stole to be used is not a matter of the same or like nature, and that the inhibition has gone beyond the monition. In other respects the case of Mr. Enraght is the same as that of Mr. Dale, and I am of opinion that as regards the prohibition in both cases the appeal fails.

Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue. The question here, therefore, is whether the promoters, after the matter had been properly signified to the Court of Chancery, have proceeded regularly. In my opinion they have not. The matter having been properly signified to the Court of Chancery the writ was issued out of the Petty Bag Office. The procedure with respect to this writ is regulated by the statute 53 Geo. 3, c. 127, which incorporates an enactment contained in the statute 5 Eliz. c. 23, s. 2, that the writ "shall be forthwith brought in the Court of King's Bench, and there in the presence of the justices shall be opened and delivered of record to the sheriff," &c. In the present case it may be said that the writ was brought into the Court of Queen's Bench, but the question is whether within the meaning of the statute of Geo. III., it was opened in the presence of the justices. Mr. Wills argued that even before the Petty Bag Act (12 & 13 Vict. c. 109), there would have been no occasion to bring this writ into the court itself, for that the words "and there in the presence of the justices" were merely equivalent to a description of the Court of Queen's Bench, but he was unable to reply to the point which was put to him, that in that case those words are entirely useless and unmeaning, because the expression "into the Court of King's Bench," describes the court, and if the next words describe the court again they are mere surplusage. That is not the proper mode of reading the statute unless we are obliged to do so. We must endeavour to give some meaning to the words. Now all the cases upon this

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point, the opinions of Lord Chief Justice Holt, of Lord Chief Justice Parker, and especially of Mr. Justice Pratt, seem to me to shew that there is a reason why those words should have a meaning given to them, and that they were inserted in order that the power of the Court of Queen's Bench should not be exercised to enforce and assist the judgment of an ecclesiastical court, without the judges of the Court of Queen's Bench having the power of seeing whether the matter was one in which, so far as appeared upon the face of the documents, the ecclesiastical court ought to ask them to assist. The judges of the Queen's Bench Division have not differed from that. Lord Coleridge expressly states that he thinks the words are not mere directory words. He seems to agree with the judgments of the judges in the old cases, so does Field, J., and so apparently does Manisty, J. But then it is said, and the Divisional Court has so decided, that this substantial enactment was repealed by the Petty Bag Act. Now that statute assumes to deal only with the issue of a writ out of the Petty Bag Office. It does not assume to deal at all with the proceedings in the Court of Queen's Bench when the writ comes there. Here the whole point is whether this matter was rightly conducted after the writ had left the Petty Bag Office, and when it came to the Court of Queen's Bench. It seems to me that the Petty Bag Act does so far repeal the statute of Geo. III., as to make it regular that the writ should be issued from the Petty Bag Office out of term, and be made returnable in the Queen's Bench out of term, those being matters expressly stated in the Petty Bag Act, but does it repeal the substantial enactment, that when the writ arrives at the Queen's Bench it is to be opened in the presence of the justices? It is said to have done so by implication, but that cannot be unless the two statutes cannot stand together. It seems to me that they can stand together, that the writ may issue out of term, and may be returnable out of term, but that nevertheless it must be taken into the Court of Queen's Bench, not for the mere purpose of being brought into a particular building, but in order that the judges there may have the opportunity of seeing whether upon the face of it it is a writ with regard to which they ought to exercise their power.

I think, therefore, that the appeal as to the prohibition fails,

but that upon the appeal as to the habeas corpus, the persons who undertook the conduct of this writ, in order to obtain the imprisonment of Mr. Dale and Mr. Enraght, have failed in conducting their case successfully, because they have, by a not unnatural mistake, conducted it in an irregular mode. I desire to state that, although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the courts at Westminster will not allow any individual in this kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of her Majesty's subjects.

COTTON, L.J. In this case the appellants seek to be released from custody on various grounds, which may be summarised as coming in part under the applications for prohibition, and in part under the applications for habeas corpus. Before considering the different questions which arise, I wish to say one word as to what we are dealing with. We are not dealing with the question whether a punishment has been rightly inflicted upon the appellants. It is no question of punishment, it is merely a question as to whether the process to enforce obedience to an order of the Court has been rightly issued and rightly used. The inhibition is a mere process for enforcing obedience to the monition, it is not an order prohibiting the continuance of certain practices which have been declared to be illegal, but an order inhibiting the clerks from performing any act of divine service within the diocese. It is a matter utterly unconnected with the practices with reference to which the suits were instituted, and is in no way whatever to be treated or considered as a punishment for them, but as simply a proceeding to enforce obedience to an order of the Court.

First, as to the prohibition. It has been said that Lord Penzance has no power at all to issue a significavit, in order that process might issue to enforce the order of inhibition. That

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depends on the Act 53 Geo. 3, c. 127, and I will consider the several objections taken to the power of the judge to issue the significavit.

The statute applies only in causes which, according to the laws of this realm, are cognisable in ecclesiastical courts, and the person against whom the writ issued must be a person lawfully cited to appear in an ecclesiastical court, and he must have disobeyed a lawful order of such a Court. These are the three matters to which the argument of the appellants was addressed.

On the first point, that this was a matter cognisable in an ecclesiastical court, I need say hardly anything. Subject to what I shall have to say at a later stage as regards the Statute of Citations, the subject-matter of these proceedings was always cognisable in the Court of Arches, but at all events in the ecclesiastical courts.

Then we come to the question (and no doubt it is a serious one, although it is one on which I entertain not the slightest doubt,) whether the appellants here have been cited to appear in an ecclesiastical court, that is to say, whether Lord Penzance when he made the order was acting as and was a judge of an ecclesiastical court. Now for my own part I decline to decide what would have been the result if these proceedings had taken place before the vacancy in the Court of Arches. No doubt it may fairly be argued that you must regard the status of the judge before that event occurred, in considering whether after that vacancy had occurred he can be considered as a judge of the Court of Arches and a judge of an ecclesiastical court, and if there were any doubt on the construction of the statute as to his position after the vacancy had occurred, I should have considered and dealt with the question as to his position before the vacancy, but in my opinion it is not necessary to be considered, having regard to the provisions of the statute after the vacancy occurred.

The statute expressly says that, whenever a vacancy shall occur in the office of the official principal of the Arches Court of Canterbury, the judge shall become ex officio such official principal. From that time at all events he is the judge of that Court, all acts done by him are done by him as head of that Court, and his orders are the orders of the Court. It was said

that doubt was thrown upon that by the words, that "all proceedings thereafter taken before the judge in relation to matters arising with the province of Canterbury shall be deemed to be taken in the Arches Court of Canterbury." One explanation of that has been given by the Attorney-General which I think is a good one, but there may be another explanation. The words may have been used to prevent any argument that when vacancies had occurred in the offices of official principal of the Provincial Court of Canterbury and of official principal of the Chancery Court of York, and the same person had become judge of both courts, the two separate and distinct courts were at an end, and that all that existed was some court constituted by Act of Parliament. In my opinion we are not dealing here with a new court constituted by Act of Parliament, but with the old Court of Arches. The appellants then have been cited to appear in an ecclesiastical court, and all the requisitions of the statute have been complied with.

It was urged, however, on behalf of the appellants, that if this is not a new court there is a new jurisdiction given to it. We often fall into difficulties from not accurately defining what we mean by the language we use. No new jurisdiction is given to the court of which Lord Penzance is the official principal as regards the subject-matter of these proceedings. The matter was within the cognizance of the ecclesiastical courts and within the cognizance of the Court of Arches. The giving a new jurisdiction as against individuals is a very different thing from giving a new jurisdiction, in the sense of a different subject-matter being brought within the cognizance of the Court. When you say that new jurisdiction as against individuals is given, it means that power is given to cite and compel appearance as against persons who could not previously have been cited and compelled to appear. The present statute does not give a new jurisdiction against individuals, but only removes certain restrictions, imposed by the Statute of Citations, on the power of the Arches Court as to citing before it individuals not in the diocese in which they resided. The Statute of Citations did not take away any original jurisdiction of the Court of Arches, but simply prohibited that Court with certain exceptions from citing persons beyond

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their diocese. The exceptions shew that the Court had original jurisdiction, and Sir John Nichol, in *Chichester* v. *Donegal* (1), says, "It is certainly true that both the canon and statute law forbid the citing of parties out of their dioceses or peculiar jurisdiction. But it is equally true that the rule, at least in the statute law, was meant for the benefit of the subject, which benefit it has uniformly, as far as I see, been held to provide for sufficiently by giving the defendants who are so cited the privilege of pleading to the jurisdiction. Consequently, if a party who is so cited once waive that privilege by appearing and submitting to the suit, he or she is bound to the jurisdiction." So, then, even if in any sense it can be said that new jurisdiction was by this Act given to the Court of Arches, it was only the power of citing compulsorily and not a new jurisdiction as regards subject-matter. That is an important distinction, and if the jurisdiction is new only in the sense that the Court is enabled to cite persons whom it could not otherwise have compelled to appear, then in exercising that jurisdiction it will, without doubt, be acting as the old court and have all its original powers. That being so, all pretence for saying that a new jurisdiction is given to this court, in the sense of its having power to deal with new subject-matter, in my opinion disappears.

Then it was said that new powers were given to the Court under s. 13, and that therefore the old powers of the Court cannot be exercised as regards orders made under that section. I will assume it to be true that a power is given by that section of making an order which, according to the practice of the ecclesiastical court, would not have been made in consequence of disobedience to a monition; but, when made, it is an order of the Court, and if it is the order of the Court, no principle can require or enable us to say that in enforcing that order, although it is one which could not have been made without that statutory authority, the Court has not the power which it had originally of enforcing any of its orders. I will here refer to the point which was pressed upon us in argument that in *Hudson* v. *Tooth* (2) expressions were used by some of the judges which seem to say that this was a new jurisdiction and a new court. If they had said so I should decline to follow what they laid down; but if we look at what they decided,

(1) 1 Add. 17. (2) 3 Q. B. D. 46.

they did not, upon a fair interpretation of their language, express any opinion that there was a new jurisdiction given or a new court in any sense inconsistent with what I have said. Mr. Tooth had been cited to appear in a place not sanctioned by the Act, and did not appear, but let the matter go on by default. If there was no power to compel appearance, the Court had no jurisdiction to go on in the absence of the party cited, and the judgment was ultrà vires. The expressions of Lush, J., which were principally relied on, must be considered with reference to the question before him. He particularly notes that Mr. Tooth did not appear, and says that that being so there was no jurisdiction, because the place to which he was cited to appear was not a place in which he could be cited to appear compulsorily. That is not in any way inconsistent with our judgments.

Then comes the question whether the orders made in this case were lawful orders. It is said that they were not, for that the statute gives a remedy, and that it was the only remedy if a clerk refused to obey the order of the Court. Now, if the question were whether a significavit could be issued for disobedience to a monition, we should have to consider whether the remedy given by s. 13 for disobedience to the monition is, on the true construction of the Act, the only remedy; but we have not to deal with that question, but only with the question whether obedience to the inhibition can be enforced by significavit, and, as has been already pointed out, there is no penalty attached by the Act to disobeying the inhibition.

Then it is urged that we can see in the Act another ground for saying that no significavit can be issued to enforce the inhibition, namely, that the bishop has power under certain circumstances of dealing with the matter, and that he is the person who, if his monition is disobeyed, must make an order of inhibition, and as he would have no power to issue a significavit neither has the judge. In my opinion, even if the bishop were the person who was to issue the inhibition in cases where he had issued the monition, the consequence contended for would not follow. If a person has power in certain circumstances to deal with the matter, but cannot issue a significavit to enforce obedience to his orders, because he is not an ecclesiastical court, why should an eccle-

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siastical court, or the judge of that court, having power to make a similar order, be deprived by inference of the power he would otherwise possess of enforcing his order? In my opinion that would not be a fair or proper construction of this or any other statute. But the foundation of it fails, because, in my opinion, the bishop, if he deals with the matter and issues the monition, is not the person to issue the inhibition. The bishop acts only by the consent of the parties, and it is provided by s. 9 that if both parties "state their willingness to submit to the directions of the bishop without appeal, the bishop shall forthwith proceed to hear the matter of the representation in such manner as he shall think fit, and shall pronounce such judgment and issue such monition (if any) as he may think proper, and no appeal shall lie from such judgment or monition." If the parties refuse to submit to the monition, why is it necessary that proceedings to enforce it should be taken before the bishop? It is true he has to decide whether his monition has been obeyed or not; but when that has been done there is no word in the Act saying that he is to deal further with the matter, and there are words at the end of the 13th section which point to this, that the judge is to act in directing proceedings for enforcing obedience to the monition. In my opinion the functions of the bishop, except so far as the Act says the contrary, are restricted to giving his directions as to the matters in which the parties have agreed to be bound, and therefore the foundation of the argument addressed to us on that point, in my opinion, fails.

We then come to the question whether the monition and inhibition are wrong in form? As to that, I confine myself to saying that, in my opinion, the Act of Parliament gives power not only to make rules without forms, but to make forms as part of the rules, and as the forms referred to in the rules were properly made under the authority of the Act, and as the monitions and inhibitions follow the forms given in the rules, in my opinion, that is sufficient, and if independently of the rules and forms there would (I do not say that there would) have been any objection to the form of the monition and inhibition, I think that the rules and forms remove it.

I will now deal with the objection to the inhibition raised in Mr.

Enraght's case. It is this, that the monition commanded him to abstain from unlawfully wearing certain vestments, and from allowing or permitting other persons unlawfully to do the same, "and also from all practices, acts, matters, and things of the same or a like nature to those hereinbefore particularly set forth, or any of them, or from unlawfully permitting the same, or any of them." The Act (s. 13) says, "Any question as to whether a monition or order given or issued after proceedings before the bishop or judge, as the case may be, has or has not been obeyed, shall be determined by the bishop or the judge, and any proceedings to enforce obedience to such monition or order shall be taken by direction of the judge." The monition was in the present case the monition of the judge, and therefore he had to determine whether it had been obeyed or not, and when we find that he has decided that certain vestments, although not mentioned in the monition, are unlawful vestments, and there is in the monition a warning against doing any acts similar to those specially mentioned, I think it is impossible for us to say that the judge has exceeded his power, in saying that permitting the wearing of a stole is an act of the same or a like nature as the acts mentioned in the monition, and is a disobedience to the monition. A judge ought indeed, in my opinion, to be very careful in introducing into the reasons for granting the inhibition any matters not dealt with in his original judgment and in the monition; but whether he had acted with a sufficient exercise of judicial discretion or not is matter of appeal, and we must not be led into saying that there is an excess of jurisdiction by any doubt whether any appeal on such a point is given by the statute, or by any view that if we were sitting here as appellate judges, hearing an appeal from the granting of the inhibition, we should have come to a different conclusion from that of the judge.

I now come to the habeas corpus, and on this I cannot agree with the opinion of the Court below. Here is a statutory writ issued under the 53 Geo. 3, c. 127, which expressly provides that certain provisions in the statute 5 Eliz. c. 23, shall extend and be applied to the writ and the proceedings following thereupon, "as if the same were herein particularly repeated and enacted." I quite agree with Brett, L.J., that when persons take upon

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themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but in a matter of substance. The Act of 5 Eliz. c. 23, enacts that after the writ has been made and sealed it shall be forthwith brought into the Court of Queen's Bench and there, in the presence of the justices, shall be opened and delivered of record to the sheriff. There are two requisitions. It is to be brought into the Queen's Bench and there, in the presence of the justices, it is to be opened. In my opinion it would be wrong, according to the ordinary rules for construing any document, to say that the words "in the presence of the justices," mean nothing more than what had been originally expressed by "brought into the Court of King's Bench." No doubt where it is stated that a man was cited to appear before our sovereign lady the Queen, in her Court of Queen's Bench, that means only that the matter was in the Court of Queen's Bench, but here we have it expressed that the writ is to be brought into the Court of Queen's Bench, and then we have something more. Looking at the statute alone, apart from decisions, one would say that it meant that something should be done before the justices of the Court of Queen's Bench, which was going to take upon itself the inrolling and consequent enforcement of this writ. The writ issues, as of course, out of the Petty Bag Office when a significavit is brought there. The statute gives greater facilities for enforcing the writ and for obliging the sheriff to do his duty, but it requires that, before the writ is put into the hands of the sheriff, it shall be brought into the Queen's Bench and there opened in the presence of the justices, and why? That they may see that the ecclesiastical court does not, without sufficient reason, get the benefit of the process of the secular court, in order to take the person who is charged with an ecclesiastical offence. It is true that as a general rule the judges of the court would not read the writ to see whether it had been properly issued, but if it is brought into court and handed to the officer he can at once, if there is any doubt, consult the judges as

to whether or no it is a writ that ought to be issued. It is not really necessary to enter into the question whether it ought to be brought into open court, or whether it is sufficient to take it into one of the offices of the court while the Court is sitting. What the respondents here contend for is that the requisitions of the statute are sufficiently complied with, if the writ is taken into the office of the court when the judges are not sitting, and when, therefore, the officer of the court cannot consult them at the time. In my opinion that is wrong, as the subject would thus be deprived of the protection given by the statute, that the writ shall not be put into the hands of the sheriff without there having been an opportunity of the judges being immediately consulted, if there is any doubt whether the writ has been properly issued or not. In my opinion it ought to be brought into open court, because, having regard to the way in which men generally conduct business, if there is a slight doubt in the mind of the official, he is much more likely to ask the judges about it if he is sitting below them in court, than if he is in an office out of sight of the judges and perhaps at a considerable distance from them. There is no express decision on that point, which does not seem ever to have arisen, but in my opinion what was said by Lord Chief Justice Parker and Mr. Justice Pratt, in *Rex* v. *Theed* (1) strongly supports the view which I and the rest of the Court take. The question in that case was whether the writ might be quashed before the return day, and Chief Justice Parker says, "Certainly this Court might have quashed it before it was delivered to the sheriff, a fortiori therefore now, for it is no more than for us to correct our own mistake by calling back a writ that issued through our oversight." Unless the writ were to be brought into Court and the judges were to be taken as looking at it, how could there be any oversight on the part of the judges or any mistake of theirs that they would have to correct? Then Mr. Justice Pratt says, "I take the reasons of the provision that this writ issuing out of Chancery and returnable into this court must first of all be opened in this court, and in the presence of the justices of this court be delivered to the sheriff, to be a provision in favour of the liberty of the subject, that the subject may not be deprived of his liberty

(1) 10 Mod. 351.

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by writs which issue of course out of Chancery, until such time as the judges of this Court see whether he has deserved it or not." These observations strongly support the view which I take, and the judges of the Queen's Bench Division were also of opinion that the omission was one which would have been fatal, but for the Petty Bag Act, 12 & 13 Vict. c. 109.

The Queen's Bench Division has held that the statute I have just mentioned makes the proceedings regular. I do not deal with the question whether the writ could be issued by the Petty Bag Office out of term or not. I think it probably could, but that is immaterial. We are dealing with the enactment that the writ shall be "opened in the presence of the justices." It is said that the Petty Bag Act repeals that enactment. In my opinion it would be wrong, without absolute necessity, to hold that a statute intended to regulate the practice of the Petty Bag Office repeals a provision in the statute of 53 Geo. 3, c. 127, as to something required to be done in the Court of Queen's Bench, which provision was introduced for the protection of the subject. In my opinion it has no such effect. A later statute does not without express words repeal an earlier one, unless the two cannot stand together. It was argued that the Petty Bag Act meant not merely that writs might be issued in vacation time, but that all writs might be made effectual in vacation time. There is nothing to that effect in the Act. It only enacts that writs may be issued in the vacation, and made returnable in the vacation, and that is not in any way inconsistent with the view that some of these writs before they can be made effectual, or be put into the hands of the sheriff, must be taken before the Court of Queen's Bench while it is sitting, and the Court must consider, before putting them into the hands of the sheriff, whether or no they have been properly issued. The judges of the Court below in construing the provisions that the writ may be issued in vacation, and may be returnable in vacation, seem to have construed "may" as "must." That is to say, they appear to have considered that if a writ was issued at the beginning of the Long Vacation it must be returnable in the Long Vacation. But there is nothing of that kind in the Act. Whenever it is necessary, in order to make the writ effectual, that the return day shall be at a distant

period, because vacation intervenes, the officer will make it returnable on a distant day, and it is not a fair construction of the Petty Bag Act that a writ issued at the beginning of the Long Vacation must be made returnable within the vacation. If that is so, there is nothing whatever in the Petty Bag Act inconsistent with the provisions of 53 Geo. 3, c. 127, which require the writ to be brought into open court when the judges are sitting.

The practice has been referred to. It is true, no doubt, that there are a number of cases in which these writs have been issued and made returnable in vacation, and put into the hands of the sheriff when the Court was not sitting, but it is not shewn that any one was ever arrested under one of them; and if not, there was no opportunity of testing whether the practice was right. In my opinion the appellants are right in saying that the provisions of 53 Geo. 3, c. 127 have not been duly complied with, and that they are entitled to their discharge.

Appeal allowed.

1881. Jan. 29. The case was put into the paper to be spoken to as to the form of order.

W. Phillimore, for the appellants. We do not understand whether the Court has decided that the writ could be properly issued in vacation. If it could, the appellants fail as regards the supersedeas.

JAMES, L.J. We all intended to decide that the writ could be properly issued out of term, and that it is a good writ; the only fault being that it was not properly brought into the Queen's Bench Division. The appellants, therefore, are not entitled to a supersedeas.

W. Phillimore. The promoters then will be entitled to their costs on the rules for supersedeas, prohibition, and certiorari; but Lord Penzance ought not to have any costs of the appeal, the same principle being applicable as was applied to his costs in the Court below. The appellants will have their costs of the proceedings as to the habeas corpus.

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Sir Henry James, A.G., for Lord Penzance, submitted the point to the Court.

[THE COURT asked what was done as to the costs of Lord Penzance in *Martin* v. *Mackonochie* (1), and Phillimore stated that he received costs of the appeal, the order of the Court below as to his costs being left untouched.]

JAMES, L.J. There having been no notice objecting to the order as to Lord Penzance's costs in the Court below, that order in that respect will stand, but his costs of the appeal will follow the usual course, and he will receive them from the appellants. If parties choose to appeal they must take the consequences, and we ought not to go into any inquiry who the respondents are.

Jeune. As regards the habeas, the Court has no power to give costs. The proceedings as to the habeas are in the nature of criminal proceedings in which no costs are given.

JAMES, L.J. In my opinion there is no reason as regards the habeas why we should not follow the ordinary rule, that where a person fails in an appeal he should pay the costs of the appeal, and that where a person resists an appeal and fails he should pay the costs. It appears to me that all the proceedings in this case are of a civil character. The only offence was disobedience to an order of the Court, and to say that proceedings to enforce obedience to that order are in the nature of criminal proceedings would be an abuse of terms. The appellants will pay the costs of the appeal on all the rules on which they have failed, no distinction being made between the costs of Lord Penzance and those of the other respondents, and they will have their costs of the appeal as to the habeas, the one set of costs being set off against the other.

BRETT, L.J. It appears to me that no part of these proceedings from beginning to end can be called a criminal proceeding. The process originally was for contempt—that is not criminal. Neither is an application for a habeas corpus a criminal proceeding. A man may be in confinement because he is alleged to be a lunatic, and if he applies for a habeas, the application has no connection

(1) 4 Q. B. D. 697.

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with crime. If it is applied for by a person who is in custody for an alleged crime, it is applied for on the ground that he is innocent, and the application is not a criminal proceeding. The application for a habeas was not a criminal proceeding, and certainly the appeal here is not.

COTTON, L.J. I am of the same opinion, and think it unnecessary to add anything.

Solicitors for appellants: *Brooks, Jenkins, & Co.*
Solicitor for Lord Penzance: *Solicitor to the Treasury.*
Solicitor for promoters: *James Girdlestone.*

[IN THE COURT OF APPEAL.]

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GLYN, MILLS, CURRIE, & CO. *v.* THE EAST AND WEST INDIA DOCK COMPANY.

Sale of Goods—Bill of Lading—Title of First Indorsee—Production of Unindorsed Copy—Warehouseman, Liability of.

Goods having been shipped for London consigned to C. & Co., the captain signed a set of three bills of lading, marked "first," "second," and "third," respectively, making the goods deliverable "to C. & Co. or their assigns, freight payable in London, the one of the bills being accomplished, the rest to stand void." During the voyage C. & Co. indorsed the bill of lading marked "first" to the plaintiffs for valuable consideration. Upon the arrival of the ship at London, C. & Co. entered the goods consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the captain lodging with the defendants notice under the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to and lodged with the defendants the "second" of the bills of lading. The defendants accordingly entered C. & Co. in their books as enterers, importers, and proprietors of the goods and, the stop for freight being afterwards removed, they delivered the goods to various persons upon delivery orders signed by C. & Co.:—

Held, by Bramwell and Baggallay, L.JJ. (Brett, L.J., dissenting), that the defendants had not been guilty of a conversion, and that no action could be maintained against them by the plaintiffs.

Judgment of Field, J. (5 Q. B. D. 129), reversed.

APPEAL by the defendants from the judgment of Field, J., after trial without a jury.

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The facts are sufficiently stated in the report of the proceedings before Field, J. (1), and in the judgment of Brett, L.J.

June 12, 14, 15, 17, 18, 1880. *Sir F. Herschell, S.G.*, and *J. C. Mathew*, for the plaintiffs.

Watkin Williams, Q.C., and *Pollard*, for the defendants.

The arguments are sufficiently noticed in the judgments of the Lords Justices.

Cur. adv. vult.

Nov. 19, 1880. The following judgments were delivered:—

BRETT, L.J. This case seems to me to be one of unusual difficulty. The solution of it depends so entirely upon a minute examination of the legal and business effect of each step in the transactions described in it between the various parties, that it seems to me to be necessary to state those successive steps with considerable particularity.

The sugar, which is the subject-matter of the litigation, was shipped in Jamaica by one Elliott, and consigned to Messrs. Cottam, Morton, & Co., merchants in London, as owners. The captain signed three copies of a bill of lading in ordinary form, dated the 16th of April, 1878, in favour of Cottam, Morton, & Co. or their assigns, deliverable on payment of freight. On the 15th of May, 1878, whilst the ship was at sea, Cottam, Morton, & Co. obtained an advance from the plaintiffs, who are bankers in London, and in respect of such advance indorsed one copy of the set of the bill of lading, and handed it to the plaintiffs with a letter of charge in the following form: "May 15th, 1878. We beg to apply for an advance of 13,000*l.*, to be repaid on or before the 15th of July, 1878, on bills of lading in schedule over leaf, to be lodged with you as collateral security. We may, with your consent, substitute other bills of lading for all or any of the bills of lading now lodged by us. We further agree that the total of our indebtedness to you in respect of this advance and any other advances from you to us on bills of lading, or any other account, shall be regarded as collaterally secured by all bills of lading lodged by us with you and in your possession from time to time.

(1) 5 Q. B. D. 129.

In event of default being made in payment of this or any other advance from you to us at due date, or in other case of need, you are at liberty to realize all the produce represented by the bills of lading in your possession," &c. The ship arrived on the 27th of May, and went into the East and West India Docks, belonging to the defendants, the dock company. Cottam, Morton, & Co. entered the goods at the Custom House and afterwards perfected such entry. On the 28th of May the captain, with the knowledge and at the request of Cottam, Morton, & Co., landed the sugar and deposited it with the defendants, the freight not being paid. The captain landed at the same time the whole of his cargo, and destined partly for other people. At the time of so doing the captain lodged with the defendants a copy of his manifest, the copy being made by entries on a form of manifest distributed by the defendants. The names of Cottam, Morton, & Co. and others were entered in the manifest as "consignees" of the goods severally consigned to them. At the bottom of the defendants' forms of manifest there was a printed statement as follows: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorize the East and West India Dock Company to deliver the same to the consignees as above, or to the holders of the bills of lading." In the present case the words "to the consignees as above" were struck out, and the captain signed the order as an authority in terms "to deliver the same to the holders of the bills of lading." On the back of the form of manifest was a memorandum "for the guidance of captains and owners of all vessels entering the East and West India Docks to discharge their cargoes in respect to making their reports and completing their manifests." "The report of the ship and of the cargo must be made at the Custom House within twenty-four hours after her arrival; and two true copies of the manifest of the cargo must be delivered into the general office of the East and West India Dock Company at the dock house," &c. "No ships can receive their rotation, or be allowed to break bulk, until their cargoes are duly entered; and such cargoes will be landed in due succession according to the strict order in which the manifests are delivered at the general office." "Care must be taken that the names or firm of the consignees agree with the bills of lading."

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"Notice to detain the cargo for freight, and for subsequently removing the stop, should be given on the printed forms which may be obtained at the general office." "By the Act 25 & 26 Vict. c. 63, s. 68, &c., goods landed in the docks, and lodged in the custody of the company, are subject to the same claim for freight as such goods were subject and liable to while the same were on board the vessel; and upon due notice in that behalf being given will be detained accordingly." "No goods can be stopped for freight after the documents for delivering have been issued." Upon the landing of goods in their docks and delivery of them into their custody, the defendants were in the habit of having a copy of the bill of lading of the goods entered on a form of bill of lading of their own. On the back of this form was a memorandum, "When the consignee in the manifest is not the holder of the bill of lading, or the goods are reported as consigned to order, the bill of lading must be produced and a duplicate or true copy thereof deposited, except for East India produce: in such cases the originals only can be accepted." "Particular attention is necessary in the regularity of the indorsements, as the company's officers cannot pass any bill of lading on which the authority of the shipper to the holder is not deduced by a complete and accurate chain of indorsement." "In all cases of informality in bills of lading, from want of indorsement, &c., or of their being lost, application must be made to the Court by letter, stating the circumstances and inclosing any documents which will shew the title to the goods; in every such case the applicant must engage to indemnify the company by bond or otherwise, as the Court may direct."

On the 29th of May the captain lodged with the defendants a stop order for the freight pursuant to the Act 25 & 26 Vict. c. 63, s. 68, &c. "I hereby give you notice to detain, &c., the goods, except samples, &c., until the freight, &c., shall be paid, &c., &c." In the present case Cottam, Morton, & Co. instead of filling up at the time of the landing of the goods as above described a bill of lading form of the defendants, so as to make it a copy of the bill of lading of the sugar, brought on the 31st of May, and handed to the defendants, one of the copies of the bill of lading of the sugar. Thereupon the defendants made an entry in a column of their

books of the name "Cottam, Morton, & Co." under a heading "Proprietor by bill of lading or transfer order." The copy bill of lading thus handed to the defendants was not indorsed. On the 7th of June, upon payment of the freight by Cottam, Morton, & Co., the stop for freight was taken off by authority of the captain's agents. On the 3rd of July, Cottam, Morton, & Co. gave a delivery order of the sugar to Williams & Co., which order was on presentation to the defendants accepted by them, and on it they afterwards delivered the sugar to Williams & Co. Cottam, Morton, & Co. filed their petition for liquidation on the 15th of August. The plaintiffs demanded the sugar of the defendants, producing to them the indorsed bill of lading; but could not obtain delivery, the sugar having been already delivered to Williams & Co.

The first step to be considered is the advance by the plaintiffs to Cottam, Morton, & Co., the indorsement in respect of it of the bill of lading by Cottam, Morton, & Co., and the signing by them and acceptance by the plaintiffs of the accompanying letter of charge. The business effect was, according to the manifest intention of the parties, as it appears to me, to give to the bank, until the advance should be repaid, the security of the goods; but in such a manner as that the borrowers of the advance might in the meantime deal, with regard to the goods, to a certain extent as owners of them. They were to have the power of making contracts as to their ultimate disposal; they might on the arrival of the ship, so far as the plaintiffs were concerned, select the wharf or dock in which the goods were to be deposited until the freight should be paid; might perfect the entry at the custom house; they might do everything with regard to the goods which an unshackled owner might do except take them into their own possession or deliver them actually into the possession of any other persons than the plaintiffs, to be held by such persons otherwise than subject to the plaintiffs' right of actual possession immediately the freight should be paid. As between the plaintiffs and Cottam, Morton, & Co. the freight was not to be paid by the latter until they had redeemed the bill of lading from the plaintiffs. I think this is so, because if the other copies of the bill of lading had been destroyed, as they ought to have been, the dock company

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would not have as matter of fact delivered to Cottam, Morton, & Co. without the production of a copy of the bill of lading, which must then have been the redeemed one, reindorsed by the bank. Cottam, Morton, & Co. would not in regular course have deposited any copy of the bill of lading with the dock company; they would have made a copy of the bill of lading on a form of the defendants. The power left to Cottam, Morton, & Co. was, according to the intention of the parties, not a power to act as agents for the plaintiffs; but a power to act on their own behalf in respect of the conditional equitable interest in the goods still left by the agreement in them. The legal effect of the transaction, in my opinion, was, that by the indorsement of the bill of lading the legal property in the sugar was transferred to the plaintiffs, and as between them and Cottam, Morton, & Co. a legal right to the immediate actual possession of the sugar by the plaintiffs on the arrival of the ship; but by the letter of charge there was left to Cottam, Morton, & Co. an equitable right to resume the legal and absolute ownership of the sugar on repayment of the advance, and an equitable right that the plaintiffs should not for a specified time exercise any rights of ownership over the sugar, but that Cottam, Morton, & Co. might exercise any such rights which would not be inconsistent with the validity of the plaintiffs' security. The relation between two such parties was likened by Willes, J., in *Meyerstein* v. *Barber* (1), to that between a pledgor and pledgee of goods, where the goods under pledge are left in or given into the actual custody of the pledgor to be used by him, but are held to be nevertheless in the constructive possession, for the purpose of the validity of the pledge, of the pledgee, inasmuch as without such possession there could be no valid pledge, which was nevertheless intended to be valid. I think, however, that he was speaking of the likeness of the business view in the two cases and not of the legal view. To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of *Lickbarrow* v. *Mason* (2), namely, that such an indorsement passes the legal property. It is suggested that the indorsement of a bill of lading, when accompanied by such a letter of charge,

(1) Law Rep. 2 C. P. 33, at p. 51. (2) 2 T. R. 63.

has not the same fulness of effect in passing the property as if there were no such letter of charge. But, upon consideration, I am of opinion that an indorsement of a bill of lading for an advance does by the mercantile law of England pass absolutely the legal property in the goods to the indorsee, and a consequent right in law of immediate actual possession against all the world, except some one who may have an independent superior legal right of temporary possession. The right of the borrower of an advance on an indorsement of a bill of lading is, in my opinion, an equity which exists only between him and the lender. I think the indorsement of a bill of lading for an advance has by the law merchant the same effect as a bill of sale has by the common law to pass the legal property in goods, and in either case an equity may be reserved which is still an equity though recognised by the common law courts. The plaintiffs, therefore, on the indorsement of the bill of lading to them, had as against Cottam, Morton, & Co., and all the world, the legal property in the sugar, and as against Cottam, Morton, & Co., and all the world, except the shipowner, a legal right at common law to immediate actual possession of the sugar on the arrival of the ship. The shipowner, until the freight should be paid, had a superior legal right to temporary possession, but on payment of the freight the legal right to immediate possession would be in the plaintiffs, and in them alone. Cottam, Morton, & Co., as between themselves and the plaintiffs, had an equitable right to deal with the sugar, as if they were still the owners of it, in any way not inconsistent with the safety of it as a security to the plaintiffs, but any taking or giving of possession by them, otherwise than as subordinate and subject to the plaintiffs' power to take immediate actual possession, would be inconsistent with such safety. The equity existed solely as between the plaintiffs and Cottam, Morton, & Co. There was nothing to raise an equity between the plaintiffs and any one else. As regards all other people the sugar was absolutely and unconditionally, in law and in equity, the sugar of the plaintiffs, to which, on payment of the freight, unless some other independent right should have accrued, they would have a right of immediate actual possession. No dealing between Cottam, Morton, & Co. and other persons unauthorized by the plaintiffs or by the law, could affect the

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plaintiffs' right of property and possession. By the indorsement of the bill of lading the plaintiffs, as it seems to me, acquired also another legal statutable right, and incurred a corresponding legal statutable liability. By the Bills of Lading Act (18 & 19 Vict. c. 111), ss. 1, 2: "Every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." "Nothing herein contained shall prejudice or affect any right to claim freight against the original shipper or owner," &c., &c. It was suggested for consideration that this statute might only apply where the indorsement and the attendant circumstances passed a complete clean transfer untrammelled by any limitation either at law or in equity. But this cannot be without adding words to the enactment, for which there appears no necessity. If in the case supposed it is assumed that the legal property in the goods has passed upon or by reason of the indorsement, the words of the statute, construed in their ordinary sense, are satisfied, and then the enactment in its ordinary sense must take effect. If it be true to say that the property does not pass, that there is no more than a pledge wherein the property does not pass, then I think the Bills of Lading Act does not apply. But as I have said, I am of opinion that the property does pass. As the statute is, in my opinion, applicable, the rights of suit under the contract against the shipowner, that is, the rights to performance of the contract by the shipowner are transferred to the indorsee. If it were not for the subsequent part of the enactment (i.e. s. 2), the meaning of the word "transferred" would be that all rights and liabilities under the contract would arise and exist between the shipowner and the indorsee, and would cease between the shipowner and the indorser, if he was the original shipper or owner. All such rights and liabilities are so "transferred," that is to say, so arise and so cease, except such as are reserved by the proviso in s. 2. No right is reserved to the original owner or shipper except the right to stop in transitu. Therefore by virtue of the statute the original owner or shipper has lost all accruing claims and right to performance

under the contract against the shipowner, and all such claims and rights are transferred to the indorsee. By the indorsement, therefore, Cottam, Morton, & Co. lost all rights to insist on any performance by the shipowner of the bill of lading contract, and such rights, as against the shipowner, were transferred to the plaintiffs accompanied by liabilities. As between the plaintiffs and the shipowner, the latter retained his lien upon their goods for his freight, but was bound to them on payment of his freight to fulfil the bill of lading obligations as to the delivery of the goods, that is, as it seems to me, to deliver, unless something intervened to relieve them, to the plaintiffs or their assigns.

The next step in the transactions, which was discussed, was the entry at the custom house. That was conducted by Cottam, Morton, & Co. They might properly do so, so far as the Customs Statutes were concerned, as original consignees or importers, although they had, subsequently to the shipment, indorsed the bill of lading. Such being the law, no one could properly be misled from the fact of their so doing into a belief that they had not indorsed the bill of lading for an advance. It follows that the fact of their conducting the customs entry had no legal effect on the plaintiffs' rights, if any, against either the shipowner or the defendants.

The next step, therefore, to be examined is the deposit of the sugar for custody with the defendants, accompanied by a stop order for freight given by the captain. Assuming even that the deposit with the defendants was a deposit in fact accepted by them at the request of Cottam, Morton, & Co., and not by the sole order of the captain, the question is what was the legal effect of the whole of that step of the transaction. If the delivery by the captain to the defendants was equivalent to a delivery to Cottam, Morton, & Co., the captain thereby lost his lien for freight; yet if the delivery to the defendants was a delivery to them as agents of Cottam, Morton, & Co., it was equivalent to a delivery to Cottam, Morton, & Co.; if the defendants accepted the goods simply as agents for Cottam, Morton, & Co., they could only have a right of action for rent against Cottam, Morton, & Co., and could have no right to hold the plaintiffs' property as by virtue of a lien for rent available against the plaintiffs. It is

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obvious, as it seems to me, from these considerations, as also even more clearly from the references in terms to the Merchant Shipping Act Amendment Act, which are contained in all the documents as to the reception of the sugar by the defendants, and the stop for freight by the captain, that all the three parties, the merchants, the captain, and the dock company, were dealing with the sugar not under contracts expressed or to be implied, but solely under and subject to the enactments contained in the statute, the Merchant Shipping Act Amendment Act, 1862 (25 & 26 Vict. c. 63), ss. 66—77. It follows that the legal rights and liabilities of each were those enacted by the statute, and depend, as to their effect, upon the true legal construction of the statute. The statute does not deal with the case of a delivery of goods to a person ready to take delivery after paying freight. It deals with the case of no such person being ready to take delivery. If the goods are landed and deposited under the statute, they are assumed by it to be so landed and deposited by the captain. "Where," says s. 67, "the owner of any goods imported in any ship" (owner being said by the interpretation clause to include every person who is for the time being entitled either as owner or agent for the owner, to the possession of the goods)— "where the owner fails to make entry thereof or, having made entry thereof, to land the same, or take delivery thereof, &c., the shipowner may make entry of and land and unship the said goods at the times, in the manner, and subject to the conditions following." A landing under this section is therefore a landing by the shipowner. The place in or on to which, if he lands, he must deposit the goods is then stated. "The shipowner in landing goods by virtue of this enactment shall place them in or on some wharf or warehouse." "If at the time when any goods are landed from any ship, and placed in the custody of any person, as a wharf or warehouse owner," which is a landing under the statute, and therefore is a landing by the shipowner, "the shipowner gives to the wharf or warehouse owner notice in writing that the goods are to remain subject to a lien for freight, or other charges payable to the shipowner, &c., the goods so landed shall, in the hands of the wharf or warehouse owner, continue liable to the same lien, if any, for such charges as they were

subject to before the landing thereof." And then the section deals with the obligation or duty of the wharfinger: "And the wharf or warehouse owner, receiving such goods," that is, receiving under the statute, "shall retain them until the lien is discharged, &c.," s. 68. "If the lien is not discharged, &c., the wharf or warehouse owner may, and if required, &c., shall, sell the said goods, &c.," s. 73. "In every case of any such sale, the wharf or warehouse owner shall apply the moneys received from the sale as follows: 1. in payment of duties; 2. of expenses of sale; 3. of rent, rates, and charges due to the wharf or warehouse owner in respect of the said goods; 4, of the amount claimed as due for freight; and the surplus shall be paid to "the owner of the goods," s. 75. "Whenever goods are placed in the custody of a wharf or warehouse owner under the authority of this Act, the said wharf or warehouse owner shall be entitled to rent in respect of the same, and shall also have power from time to time, at the expense of the owner of the goods, to do all such reasonable acts as in the judgment of the said wharf or warehouse owner are necessary for the proper custody and preservation of the said goods, and shall have a lien on the said goods for the said rent and expenses," s. 76. Now the person who is assumed to deliver the goods to the wharfinger or warehouseman, when they are treated as delivered under this statute, is the shipowner; if there were any contract with the wharfinger or warehouseman outside the statute, it must then be between him and the shipowner. There is no express contract by the shipowner to be liable to an action for rent or charges; can it be implied that the captain who intends to sail away intends to bind himself or his owners to a contract? or that the wharfinger, who knows the rights given to himself by the statute, and that the captain intends to sail away, has a right to suppose or does suppose that the captain is intending to bind himself or his owners to a contract? The statute imposes in terms no contract, but it gives certain rights by way of remuneration to the wharfinger or warehouseman.

These rights being so given, there seems nothing from which a contract giving any other rights can be inferred to be given by the statute. There is no contract, therefore, with the shipowner. None is given by the statute with the original consignee of the

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goods, or with the real owner of the goods. There is nothing from which any contract, giving a right to sue for rent or charges, can be inferred with either of them. There is, therefore, no such contract. There is no contract with any one. The remedies of the warehouseman or wharfinger are the power of sale and the like given by the statute. Both of these take effect upon the goods; that is to say, both are effective only against him to whom the goods belong, that is to say, against the real owner of the goods at the time of the sale. There is no specific statement in the statute as to the person for whom the wharfinger or warehouseman is to hold the goods at the moment the stop for freight is taken off; no specific enactment as to the person to whom he is to deliver the goods. If he sells, the person for whom he is to hold the surplus is "the owner of the goods," s. 75. That must be the person whose property is sold, that is, the real owner at the time of the sale. It follows, as it seems to me, that by the only reasonable intendment which can be made (and an intendment must be made) the wharfinger or warehouseman, by virtue of the statute, holds from the time the stop for freight is taken off for, and is then and afterwards bound to deliver to, the real owner of the goods. If it is held that he may deliver to any one else, he may have the captain's lien and his own paid off by the owner of the goods, against whose interest such lien is alone effective, and may, nevertheless, deliver the goods to the person who is no longer owner. If the wharfinger or warehouseman thus holds, as I think he does, under the statute and according to its enactments, he is not in the same position as the shipowner was whilst the goods were on board. He has different rights and different liabilities. He is not the mere agent of the shipowner. There is nothing that I can see in the statute, which would authorize him to give back the goods to the shipowner. There is nothing which would make the shipowner liable for any acts of the wharfinger or warehouseman. The shipowner has no longer charge or power or liabilities with regard to the goods. He has only his right of lien for freight. The relation of the wharfinger or warehouseman to the goods is a statutory relation, with statutory rights and liabilities attaching to him and to him alone. The statute does not give any rights to the shipowner, except the

right of lien after he has landed and delivered the goods. It imposes no liability on the shipowner. There is nothing affecting the plaintiffs' rights other than the effect produced on them by the statute. The only way, in which they could have been affected by the statute, would have been that their goods might have been detained or sold for the freight and charges. They were not detained or sold for either, but were sold and given up in a way not authorized by the statutes. If I am right in saying that the wharfinger or warehouseman is not identified with the shipowner, the question raised as to the right of the shipowner to deliver to the person first presenting to him a copy of the bill of lading does not arise. The Bills of Lading Act does not transfer the rights and liabilities of the contract in the bill of lading from the original shipper to the indorsee, so that they should arise between him and the wharfinger or warehouseman, but only so that they should arise between him and the shipowner. But if the defendants could rely upon the rights given to the shipowner as against the indorsee of the bill of lading by the transfer of the bill of lading contract, I do not think that the shipowner would have been excused as against the plaintiffs for a delivery to the order of Cottam, Morton, & Co. upon the production of the copy of the bill of lading held by them, after they had effectively and validly indorsed the whole bill of lading by indorsing a copy of it to the plaintiffs for value. It cannot, I think, be fairly said that the plaintiffs were guilty of laches in not obtaining possession of all three copies of the bill of lading. All the Courts so stated in *Meyerstein* v. *Barber*. (1) And every one conversant with business knows that no such thing is ever done. But it is said that the captain has the right, by virtue of the words in the bill of lading, "the one of which being accomplished, the others to stand void." Can it be maintained that the meaning of these words is to impose a duty, or to give a right to the captain, under all circumstances, to deliver to the person who first presents to him a copy of the bill of lading? If so, he may, or, as they are part of the contract, must, so do, although the real indorsee is present and satisfies the shipowner that he is the real indorsee. Yet that was not contended; nor could it, in my opinion, be reasonably contended.

(1) Law Rep. 4 H. L. 317.

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If so, although the captain is informed by his owner and by the real indorsee, and by the indorser, during the voyage that the bill of lading has been indorsed for value, and that his contract liability to deliver to the assigns of the indorser has thereby, by virtue of the Bills of Lading Act, become a contract liability with the indorsee to deliver to him or to his assigns, he may fulfil that contract with the indorsee by delivering the goods to a person who is not the assignee of the indorsee, nor even the legal assignee of the indorser.

The known practice of merchants to accept an indorsement of one copy of the bill of lading without requiring delivery of the other copies, is inconsistent with this view. If the indorsement of the first copy indorsed is made whilst the ship is at sea, and made for payment of a price or an advance, the copy remaining with the captain or purser cannot in fact be then delivered up, and the indorsement of the copy to hand, if the contention be valid, would be, as it seems to me, an idle security. The meaning of the words cited from the bill of lading must, I think, be, "the one of which bills being rightly accomplished, the others to stand void." A wrongful delivery to one of the copies of the bill cannot be an accomplishment of it intended by the contract, and is not therefore an accomplishment within the contract. This is contrary to the dictum of Dr. Lushington in the case of *The Tigress*. (1) I must respectfully differ from that dictum; it was not necessary for Dr. Lushington carefully to consider the words. Neither was it for Lord Loughborough in *Lickbarrow* v. *Mason*. (2) In both cases the observations are mere passing observations. I think the observation of Lord Westbury was merely by way of caution. The decision in H. Blackstone, if it means that the captain has a wayward choice, cannot, I think, be held to be even reasonable. I am therefore of opinion that the delivery of the sugar by the defendants to Williams & Co. was a wrongful delivery as against the plaintiffs, who were the owners of the sugar, and who were entitled to immediate possession of it from the defendants. There was a misdelivery by the defendants of the plaintiffs' property with intent to deal with the property. I do not think that the difficulties arising in the case of *Hollins* v. *Fowler* (3) exist in this

(1) Brown. & Lush. 38. (2) 1 H. Bl. 357. (3) Law Rep. 7 H. L. 757.

case. In this case the defendants delivered the goods to Williams & Co. as the property of Williams & Co., intending to pass the property to Williams & Co., when they were bound to hold them for, and deliver them to, the plaintiffs alone. By the notices contained in their own habitual documents, which I have set out in the beginning of this judgment, it is shewn clearly, as it seems to me, that they undertook to consider and deal with the question of the right of property in the person, who should demand delivery of goods placed in their custody under the statute. They assumed to deal with the delivery according to the right of property.

To sum up, then, the reasons upon which my opinion is founded, they are that Cottam, Morton, & Co. by indorsing the bill of lading passed the legal property in the sugar to the plaintiffs, reserving to themselves nothing but an equity of redemption; that upon such an indorsement so passing the legal property, the Bills of Lading Act transferred the contract between the shipowner and Cottam, Morton, & Co. into a contract between the shipowner and the plaintiffs; that consequently the plaintiffs were in law absolute owners of the sugar, with a contract from the shipowner to deliver to them upon payment of freight. The shipowner was bound by contract to deliver to the plaintiffs; but with a right by statute to land the sugar according to the terms of the statute to a dock company, if the freight was not paid on arrival. The shipowner did hand the plaintiffs' sugar to the defendants. He handed it under and according to the statute. The defendants accepted the sugar, the plaintiffs' sugar, under and according to the statute. There was no contract between the defendants and the plaintiffs, or between the defendants and the shipowner, or between the defendants and Cottam, Morton, & Co. The defendants were bound by a statutory duty to hold the sugar until the freight was paid, and when it was paid, to hold it for and deliver it to the plaintiffs, the holders of the bill of lading. The defendants, contrary to such duty, and therefore wrongfully, delivered the plaintiffs' sugar to Williams & Co.; that is a conversion. If the defendants could be held to be in the same position as the shipowner, a similar delivery by the shipowner would have been a conversion.

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I am of opinion, for these reasons, that the judgment of Field, J., should be affirmed.

BRAMWELL, L.J. (1) This case is, I think, one of very great difficulty—a difficulty arising from there being an unreality in the delivery of the goods in question to the plaintiffs, that delivery being symbolical; an unreality in the alleged cause of action, viz., a conversion of those goods to the use of the defendants, which, as a matter of actual fact, is untrue; from the unusual facts of the case; and, as far as I am concerned, from a want of an intimate and familiar acquaintance with the practice of merchants, bankers, shipowners, and warehousemen, the customs, and other matters which have to be considered. It is not necessary for me to state the facts; my Brother Brett has favoured me with his judgment, where they are, as I think, correctly stated, save that with submission I cannot quite appreciate them as he does. I do not think that the property in the sugars was passed to the plaintiffs with an equity of redemption, or some other equity, in Cottam & Co. I think that what took place was a pledge at common law, with a right in the plaintiffs to sell in certain events, and with a common law right to redeem in Cottam & Co. I think if there had been, instead of a symbolical, an actual delivery of goods from Cottam & Co. to the plaintiffs on the same terms, as for instance, of a case of diamonds, that the general property would not have been transferred, but would have remained in Cottam & Co., the plaintiffs having only a special property and right of possession. I cannot think that any action could have been maintained against them under the Bills of Lading Act for the freight, nor any action by the dock company for warehouse rent, or charges, or otherwise, supposing such action would lie against some one; they did, however, by the handing over to them of the bill of lading indorsed under the agreement, acquire a special property and right of possession. And I cannot doubt that as against an actual wrongdoer and against any person who had actually converted the sugars to his own use, as by its consumption or sale, or dealt with them under a claim of title, they might have maintained an action such as the present: as they would have been able to do, if the supposed

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(1) This judgment was read by Baggallay, L.J.

case of diamonds had been taken from them and delivered to a person, who sold them or used them, and would not give them up. Why, then, is not this action maintainable? The plaintiffs have a special property, and the defendants have disposed of the goods in a way they had no right to do. My difficulty is to see that the plaintiffs have made out the latter part of the proposition. It must be remembered that this is an action for conversion. If the defendants have disposed of them according to the terms on which they received them, having no notice of any claim, title, or right, other than that of the person from whom they received them, it is clear that they have not converted them to their own use, that they are not guilty of a conversion, indeed have done nothing wrong. If a man steals a chattel and takes it to a carrier to be carried to A., and there delivered to X., and the carrier takes, carries, and delivers the chattel accordingly, it is clear and settled law that he would not be guilty of a conversion. The case more like the present would be where the chattel was taken by mistake and handed to the carrier, and then carried and delivered by him. In that case clearly the carrier would not be liable to the true owner. Have the defendants done anything more than the equivalent of this? This involves an examination as to who it was from whom they received the goods, and on what terms did they receive them. In my opinion, in such cases as these as a rule, where there are no special circumstances, a warehouseman receives the goods from the ship or ship's captain on the terms of holding them for the ship till the freight is paid, and then and thenceforth of holding them to deliver to such person as the shipowner or captain would have been justified in delivering them to under the bill of lading. This is Mr. Justice Willes's opinion in *Meyerstein* v. *Barber*. (1) This, however, is subject to further consideration arising out of the particular facts of this case, to which I shall afterwards call attention. I think these are the general terms, on which such warehousemen as the defendants receive goods with a stop for freight; and with submission I think nothing turns on any statute, private or public. This also seems to be the opinion of Mr. Justice Willes in *Meyerstein* v. *Barber*. (1) I think the question is the same as it would be if the goods had been warehoused in

(1) Law Rep. 2 C. P. 38.

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the private warehouse of the shipowner, or of any other warehousemen where, consistently with customs' laws and regulations, they could have been warehoused; or if they had been left on the quay where the ship discharged, but in the custody of some one who was not to give them up till the freight was paid. I cannot think that the duty and right of the shipowner were other and different because he discharged his cargo instead of keeping it on board, and I cannot think that the warehouseman undertakes a different duty to that of the shipowner. I set no value on the captain's having struck out from the manifest the word "consignee." For "deliver to the consignee or holder of the bill of lading" is the same as "deliver to the holder of the bill of lading." For "deliver to the consignee" means "deliver to him if he is holder of the bill of lading." Of course some light is thrown on the matter by the terms of the various statutes as shewing what are the mercantile usage and practice, but I cannot think that the case is governed by them.

Then would the captain of the ship have been justified in delivering these goods to Cottam & Co. on production of their bill of lading and tender of the freight? I cannot bring myself to say he would not. I think if that is to be said, it should be by the ultimate Court of Appeal. Nearly a century and a half ago it was held in a much stronger case, viz., when the captain had notice of the true title, that he was justified in preferring the holder of one bill of lading to the holder of another really entitled. That decision was approved in *Lickbarrow* v. *Mason* (1), and by Dr. Lushington in *The Tigress*. (2) It was not disapproved in *Meyerstein* v. *Barber* (3), and it is the undoubted practice to deliver without inquiry to any one who produces a bill of lading. Then there are the words of the bill of lading, "one of which being accomplished the other two to stand void." It struck me in the argument of the case that the terms of the bill of lading were against this contention. Because the bill of lading says the goods are to be delivered to A., or order, or assignees, in this case to Cottam & Co. or assignees, and that ought to be read to Cottam & Co., or if they assign to their assignees, and that the

(1) 1 H. Bl. 357. (2) Brown & Lush, 38.
(3) Law Rep. 4 H. L. 317.

meaning of "one being accomplished" is, as my Brother Brett puts it, "one being rightly accomplished, the other two to stand void." I will not say that is not a possible meaning. The bill of lading could not mean, "to be delivered to them though they have assigned, or to their assigns, whichever present the bill of lading." Another argument occurred to me, viz., suppose a bill of lading was indorsed and stolen, would a delivery to the thief, the bearer, be a good delivery—if not why was this? If a carrier received goods to carry to A. and hold till called for by X., and Y. came and represented himself to be X., a delivery to Y. would be a misdelivery and a conversion according to the authorities. If so, why was not this? An answer given is, that in the case supposed the thief would not be the lawful holder of the bill of lading, and Y. would be committing a fraud and a crime, viz., obtaining goods under false pretences, whereas here Messrs. Cottam & Co. have lawful possession of them. I may observe, however, that Y. in the case put is not necessarily guilty of a crime: he may bonâ fide believe that the goods were for him, that he is entitled to represent X. Still he would be a tortious holder of the bill of lading, which Cottam was not. I confess to being much embarrassed by these arguments pro and con. Looking, as I do, on the bill of lading as a mere receipt for the goods, I should construe it as my Brother Brett does. But whatever their weight, there are the authorities to which I have referred, and there is the undoubted practice I have mentioned of delivering the goods to him who presents a bill of lading, and there is the possibility expressed in *Meyerstein* v. *Barber* (1) that the captain might not be liable in respect of a delivery under such circumstances. If liable on his contract to carry and to deliver to the consignee or his assignee, he would be liable as on a conversion. He is indeed endeavouring to perform his contract, but so is a carrier who delivers to Y. believing him to be X., to whom he was to deliver. I may notice that in the case before Lee, C.J., the action was in detinue against the captain, which would have been maintainable if trover would have been, and e converso. On these grounds I should hesitate long before deciding for the plaintiffs. But there are other considerations in this case which I think entitle the

(1) Law Rep. 4 H. L. 317.

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defendants to judgment. We are judges here of fact and law. Cottam & Co. retained a bill of lading in their hands with the assent of the plaintiffs, who had notice by the terms of the one deposited with them that there were two other originals, and which they must or ought to have known were, or that one would be, in Cottam & Co.'s hands. The plaintiffs, according to my view, knew that the absolute property remained in Cottam & Co., and that they, the plaintiffs, were only pledgees. The plaintiffs in no way interfere or act on the arrival of the ship. This can be and is done by an assignee of a consignee, who watches for the announcement of the ship's arrival. But Cottam & Co. act as the consignees and persons entitled to the cargo, enter the goods at the customs, direct where they shall be warehoused, pay the freight, and take such steps at the docks as owners of the goods would do. Cottam & Co., by the agreement with the plaintiffs, were to insure the goods in their own names against fire, receive the sum insured if there was a loss, and pay it to the plaintiffs. I cannot doubt, and I find, that all this was done with the assent of the plaintiffs. I have no doubt they intended that should be done which was done, except perhaps the giving of the delivery order to Williams. I impute no laches to the plaintiffs. I have no doubt that nothing they intended to do was left undone by them, and that they intended Cottam to do what he did, except, perhaps, as I have said, to give the delivery order to Williams.

The general property in the goods was, as I have said, I think, in Cottam & Co., and, as my Brother Brett says, it was intended that Cottam & Co. should do all the owner's acts, that they should have power to sell and give immediate delivery orders, and that the goods should not be entered in the plaintiffs' name at the docks, so that on a sale by Cottam & Co. either the delivery order would have had to be given by Glyn & Co., or a transfer made by them to Cottam & Co., and then a delivery order given by them. The plaintiffs never supposed they were to be liable for freight or warehouse rent, or that they were in any way to see to the goods. They might, if they had thought fit, have watched the arrival of the ship and landed the goods; they might have required a transfer from Cottam & Co., or given notice to the defendants of their title. They did nothing. And they did

nothing for a long time after Cottam & Co.'s insolvency, and then they inquired about the goods in a way shewing they had trusted to Cottam & Co., and did not know their own position and rights. It is said that to hold this is to say they had no security. That is not so. They had a perfectly good title against a vendee of Cottam, against an execution creditor, and against a trustee in bankruptcy; saving the question of reputed ownership, as to which I am by no means certain they would have any answer to a claim by such trustee. I am by no means satisfied that these goods were not in the reputed ownership of Cottam & Co. with the plaintiffs' consent within the bankruptcy law. I think Cottam & Co. had with their consent taken upon themselves the sale and disposition as owners of these goods. And that which shews that, shews also that state of facts which gives rise to this defence. I have said that perhaps Cottam & Co. ought not without the plaintiffs' leave to have given the delivery order for these goods to Williams. Undoubtedly it could not have been intended that the goods pledged should be sold and transferred of any considerable amount. But I cannot help thinking that as to a small parcel like the present no difficulty would have been made, and that it would not have been necessary for Cottam & Co. to run to the plaintiffs for leave to dispose of a hogshead of sugar. Certainly I have no doubt, and find as a fact, that according to the contemplation of both parties, the sale might be first and the leave asked for, if at all, afterwards. This being my view of the facts, I come to the conclusion that, with the assent of the plaintiffs (though I think that not necessary), the defendants received the goods to hold for the ship till the freight was paid, then to hold at the order and disposition of Cottam & Co., consequently that delivering them to Cottam & Co.'s order was no conversion of which the plaintiffs can complain, and that the judgment must be reversed. I say the assent of the plaintiffs is not essential, because if Cottam warehoused the goods in their name without the plaintiffs' assent, it might be wrong in Cottam, but a delivery by the defendants to Cottam would not be a conversion. It is scarcely necessary to add that I find no fault with the eminent firm who are plaintiffs for bringing this action. A wrong has been done by Cottam & Co., and the question arises on

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whom is the loss to fall; the plaintiffs are advised not on them, but on the defendants, and have accordingly properly brought this action. I could not blame them for so doing, unless I blamed them for adopting an opinion which I have come to several times in the course of the argument and consideration of this case. I am sorry that in the conclusion I differ from my Brother Brett, but it is not a difference on any principle of law, but one in our appreciation of the facts. He considers that the defendants received the goods to hold, after payment of freight, for the person entitled to present possession as against all the world. I think on the particular facts of this case that the defendants received them with the consent of the plaintiffs to deliver them after payment of freight to Cottam & Co., or their order; I think it would be very hard if it were otherwise; and while I admit, on the one hand, that hard cases make bad law, I contend, on the other, that the fact that a case is hard is primâ facie proof that it is not law. The plaintiffs are not without remedy; they have one against Cottam & Co. and another against Williams, unless, indeed, they are taken to have authorized the delivery to them. If they have authorized that, it is clear they have none against the defendants. If it is said that the defendants might have protected themselves by requiring the second bill of lading, the answer is, that is not customary. Further, the plaintiffs might have protected themselves that way and many others. I cannot agree with my Brother Field's judgment, which I have most carefully studied; he does not view the facts as I do. Further, as to the law, he says, and says most truly, that treating the defendants as bailees of Cottam & Co., they had no better title than Cottam. But, with great respect, I cannot agree to the consequence he puts. The same would be true of a carrier who carried for the thief a stolen chattel, but the carrying and delivering would not make a conversion nor any wrongful act. The defendants did not act as on a title. The same conclusion in favour of the defendants may, I think, be arrived at in a different way. This is an action for conversion; the alleged conversion is a delivery to the order of Cottam & Co. If the defendants received the goods to deliver to the order of Cottams, then the delivery to this order is not conversion whether Cottams had authority so to deal with the goods or not. Now I think

Cottams had such authority from the plaintiffs intentionally, though whether intentionally or not is unimportant. But suppose Cottams had not actually such authority, I still think they were permitted by the plaintiffs to have the appearance of it, and that the plaintiffs cannot be heard to say that Cottams had it not. Still further, if Cottams had no authority, actual or apparent, and if their assumption of it was wholly wrongful, yet even then, if all the defendants did was to receive from Cottams to deliver to their order and deliver accordingly, they are not guilty of a conversion. Supposing that not to be so, a more difficult question would arise. If all that appeared was that the ship landed the goods with a stop for freight, then, no doubt, it must be taken that the defendants received the goods on the terms on which the ship or captain delivered them to the defendants. What were they? It cannot be supposed that the captain delivered the goods to the defendants to deliver to any one to whom he would not be justified in delivering them; and so the question would arise whether he would have been justified by a delivery to a de facto lawful holder of a bill of lading. This, for the reasons I have given, I think we need not determine.

BAGGALLAY, L.J. The action in which this appeal is brought is founded upon an alleged conversion by the defendants of certain sugar and rum, forming parts of the cargoes of three vessels, the *Mary Jones*, the *Tropic*, and the *Anglo-Indian*, and which, in the spring of 1878, had been shipped by the said vessels from the West Indies and consigned to Messrs. Cottam, Morton, & Co. of London. The circumstances affecting the goods shipped by each of the vessels were, so far as the present action is concerned, in all respects similar; and the arguments, both on the trial before Field, J., and on the present appeal, were confined to the case of some twenty hogsheads of sugar which had been shipped by the *Mary Jones*. I shall confine my observations to these goods, and, in doing so, I shall abstain from entering into any detail of the facts, as they have been already fully stated by Lord Justice Brett.

It must, however, be borne in mind that, on the 15th of May, whilst the vessel was still at sea, Messrs. Cottam, as consignees of

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the goods, delivered one part of the bill of lading, duly indorsed, to the plaintiffs as collateral security for an advance of 13,000*l.*, to be repaid on the 15th of July; that the vessel arrived in the port of London on the 28th of May, when the goods were landed and delivered into the custody of the defendants, and that eventually, though in ignorance of the plaintiffs' title or of any claim on their part, the defendants delivered them to Messrs. Williams, under an order signed by Messrs. Cottam and dated the 2nd of July.

Several questions of great interest, and of more or less difficulty, have arisen in the course of the arguments. Of such questions the principal may be stated in the following terms:—

1. What are the duties and corresponding responsibilities of a shipowner, acting through the master of his ship, when a demand is made for the delivery of goods, accompanied by a tender of the amount of freight due in respect of them by a party producing the ostensible indicia of ownership, but having in fact no right or title to them by reason of his having previously delivered to another party, for value, an indorsed part of the bill of lading? and

2. What are the duties and corresponding responsibilities of a dock proprietor or warehouseman into whose custody the goods have been delivered under the provisions of the Merchant Shipping Act of 1862, who, whilst in ignorance of any previous or other dealing with the goods, is in like manner applied to for their delivery by a party who is apparently the true owner? are such duties and responsibilities similar to, or in what respect do they differ from, the duties and responsibilities of a shipowner under the circumstances just mentioned?

Field, J., who tried the action without a jury, gave judgment for the plaintiffs on the 23rd of January, 1880, and from his judgment the present appeal is brought.

Now I take it to be clear that, upon an application of well-recognised and established principles to the admitted facts of the present case, the following propositions are unquestionable:—

1. That the effect of the delivery by Messrs. Cottam to the plaintiffs, on the 15th of May, of the indorsed bill of lading, the other parts of the original set of three not having been previously

dealt with, was to pass to the plaintiffs the property represented by it, and to confer upon them the right to the possession of such goods upon the arrival of the *Mary Jones* in the port of London, subject nevertheless to the payment of the freight due to the shipowner.

2. That it was immaterial that the bill of lading indorsed was the first, or rather that numbered as "first," of the set, and that the plaintiffs would have acquired an equally good title to the goods if the bill of lading so indorsed had been that numbered "second" or "third" of the set, provided the others had not been previously dealt with.

3. That it was not necessary for the plaintiffs to give any notice to the master of the *Mary Jones*, or to the defendants, as owners of the docks, where the goods were warehoused after being landed from the vessel, or to do any other act, in order to perfect or assert their title to the goods as against persons acquiring possession of, or laying claim to, the same under any subsequent dealings with the other parts of the bill of lading or any delivery order obtained from the consignees or any persons claiming under them.

The principles involved in these three propositions were affirmed by the House of Lords in *Meyerstein* v. *Barber* (1), if any affirmation were necessary of what appear to have been previously well-recognised principles of mercantile law. It is a consequence of the principle involved in the third of these propositions, that every person who makes an advance upon a bill of lading, without ascertaining in whose custody the other parts remain, does so at the risk of such other parts having been previously dealt with; and in like manner every person who, after the bill of lading has been accomplished, makes an advance upon a delivery order without inquiring as to the bill of lading, does so at the risk of the property in the goods having been passed to some other person by virtue of the bill of lading. The party making the advance in either case runs this risk and must take the consequences if the result turns out to his detriment; that he can protect himself, if he thinks fit, against such risks, is clear from the report of the case to which I have already alluded of

(1) Law Rep. 4 H. L. 317.

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Meyerstein v. *Barber* (1); in that case the Chartered Mercantile Bank of India not only took the precaution of having all three parts of the bill of lading delivered to them at the time of their making the advance, but, as a further protection, lodged a stop order upon the goods in the warehouses, and by the adoption of these precautions, prevented any dealing with the goods until their stop was released. Moreover, Meyerstein, when making his advance, after the claims of the bank had been satisfied and the three parts of the bill of lading had been returned to the consignees, obtained two of the three parts of the bill of lading, and only did not press for the third because he was led to believe, or was under the belief, that it was still in the hands of the master. It would follow from these considerations, that, in the absence of any modifying circumstances, which may, though I am not aware that they do, exist in the present case, the title of the plaintiffs to the goods, and their right to recover their value, as against Messrs. Williams, who have obtained possession of them under the delivery order of Messrs. Cottam, would be clear. Both parties ran the risks to which I have adverted; neither of them made, or deemed it necessary to make, any inquiry as to the custody of the other parts of the bill of lading; in the case of the plaintiffs, their confidence was well founded; their title has not been interfered with by reason of the other parts of the bill of lading having been previously dealt with; but as regards Messrs. Williams, their claim to the goods could not prevail against that of the plaintiffs, to whom the property in the goods had passed under their indorsed part of the bill of lading.

Though, however, it was not necessary for the plaintiffs to give any notice or to do any act to perfect their title as against Messrs. Williams, considerations of a very different character would arise if the plaintiffs had by any act or conduct on their part led or induced Messrs. Williams to believe that Messrs. Cottam had authority to deal with the goods as their own. At first sight it appears somewhat strange that no notice was given by the plaintiffs to the master of the vessel or to the defendants not to part with the goods otherwise than to themselves, and still more so that it was not until some time after Messrs. Cottam had gone

(1) Law Rep. 4 H. L. 317.

into liquidation that the plaintiffs made any claim in respect of the goods or any inquiry about them; but it is not suggested that in so acting, or abstaining from acting, the course pursued by the plaintiffs was different from the usual practice of bankers, who make advances upon bills of lading. The practice has doubtless been adopted for the convenience of those engaged in like mercantile transactions, and it is based upon the confidence of the banker that the consignee will neither fraudulently nor negligently so deal with the goods as to occasion him loss in respect of his advance, and to some extent, perhaps, upon a confidence in the solvency of the consignee. In the present case, had Messrs. Cottam remained solvent, no difficulties would have arisen; their liability to the plaintiffs would have been clear, and they would doubtless have discharged themselves from it. That it was within the contemplation of the plaintiffs that Messrs. Cottam would or might to some extent, and without any previous communication with the plaintiffs, deal with the goods as their own, appears to me to be beyond doubt.

But assuming the rights of the plaintiffs against Messrs. Williams to be clear, the question remains whether it is equally clear, as the respondents have contended, that the plaintiffs are entitled to recover from the defendants the value of the goods delivered by the defendants to Messrs. Williams. I think that they are not so entitled, and I proceed to state the grounds upon which I have arrived at this conclusion. In *Meyerstein* v. *Barber* (1), though it was held that the legal ownership of the goods acquired by Meyerstein, who, in consideration of an advance to the consignees first got the bill of lading, must prevail as against Barber, who was the holder of a subsequently taken part of the same set, the question was left open whether a shipowner might not be excused who, having no notice of an earlier dealing with a bill of lading, delivered the goods to a person who produced to him another part which had been subsequently dealt with. In the course of his judgment Lord Westbury said (2), "It might possibly happen that the shipowner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party.

(1) Law Rep. 4 H. L. 317. (2) Law Rep. 4 H. L. 336.

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But although that might be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods, for the legal ownership of the goods must still remain in the first holder for value of the bill of lading, because he had the legal right in the property." It is quite true, as has been pressed upon us in argument, that the judgment in *Meyerstein* v. *Barber* (1) was in no respect based upon the distinction, so suggested by Lord Westbury, between the position relatively to the first holder for value of a bill of lading of a person who, by virtue of another part of the same bill subsequently dealt with, has acquired possession of the goods represented by it, and that of a shipowner who, in ignoranc of the existence of a first holder, has delivered the goods to a person producing the ostensible indicia of title to them; but in my opinion such distinction is not only not inconsistent with general principles, but is based upon an equitable foundation. Let us examine it a little closer. The party who, upon the hypothesis, obtains possession of the goods, obtains possession of that to which he has no legal title, though he, as well as the first holder, may have given valuable consideration for it. For convenience, or for some reason satisfactory to himself, he abstained, at the time when he made his advance, from making those inquiries which, if made, might have protected him. He must have known, or he must be presumed to have known, that as he had not all the parts of the bill of lading, it was at least possible that some other part had been previously dealt with, and that, if so, the claim under it would be entitled to preference over his own, and in the event the possibility becomes a reality. Has he any equity which should prevail against the legal title of the first holder? I think not. But the position of the shipowner who, in ignorance of any previous dealing with the bill of lading, delivers the goods to the consignee, or to a person producing an indorsed part of a bill of lading, is very different; he acts strictly in accordance with his contract. There is no question of title as between him and the first holder, whose rights have been interfered with. If responsible to the first holder at all, he is responsible in respect of something which he has, improperly, done or omitted to do.

(1) Law Rep. 4 H. L. 317.

What course can be suggested as proper to be pursued by the shipowner, acting through his master, other than that of delivering the goods to the person who, either as consignee or as holder of an indorsed bill of lading, tenders the freight and demands such delivery? Upon the hypothesis there is no rival claimant; there is nothing in the surrounding circumstances to suggest a title to the goods in any person other than the party claiming them. Is the master to inquire of the party before him whether there is an absent legal owner? Is he to insist upon a production of all the other parts of the bill of lading, even though a plausible reason be assigned for their not being produced? Is he, under such circumstances, to deliver the goods at the peril of having to account for their value in the event of the alleged reason for the non-production of the several parts of the bill of lading proving to have been fraudulently, or otherwise falsely, assigned; or is he to refuse to deliver them if he desires to keep himself free from loss? Furthermore, is he to pursue the same course with reference to every separate consignment of which his whole cargo may be made up?

It would be impossible for a shipowner to carry on his business, if he was to adopt the only course which prudence would dictate in such a position of responsibility. And the question naturally suggests itself, why should the shipowner be required to take all these precautions for the protection of a first holder, who has not thought it necessary to take any precautions for his own protection? In the view which I take of this case, it is unnecessary to consider whether the decision in *Fearon* v. *Bowers* (1) is one which should be followed in the present day; in that case there were rival claimants for the goods, and the effect of the decision, as it has been commonly understood, was, that the master had, under such circumstances, a right to deliver to whichever he thought proper, and would be fully discharged by a delivery to either. That decision was cited with approval by Lord Loughborough, in *Lickbarrow* v. *Mason* (2), and by Dr. Lushington in the case of *The Tigress* (3), and, though the case of *The Tigress* (3) was cited, during the argument in *Meyerstein* v. *Barber* (4) in the House of

(1) 1 H. Bl. 364.
(2) 1 H. Bl. 357.
(3) Br. & L. Adm. Cas. 38; 32 L. J. (P. & A.) 97
(4) Law Rep. 4 H. L. 317.

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Lords, no dissent from the principle involved in it was expressed in any of the judgments. But, notwithstanding the weight of authority to which I have just referred, I should, as at present advised, hesitate before adopting the rule that the master has in all cases an unlimited right of selection between rival claimants.

I however readily adopt the more guarded suggestion of Lord Westbury, that the shipowner, who is ignorant of any previous dealing with the bill of lading, may be justified in delivering the goods to the party presenting the ostensible indicia of ownership.

Adopting this view of the responsibilities of the shipowner, I should have had no hesitation in holding that if the goods had remained on board the *Mary Jones*, instead of being landed, he would have been discharged by the delivery of them to Messrs. Williams, upon a delivery order signed by Messrs. Cottam after payment of the freight.

In the present case, however, we have to deal, not with the acts or defaults of the shipowner, but the acts of a dock company into whose custody the goods have been delivered. On the part of the appellants, the defendants the dock company, it has been contended that under the circumstances of the present case, their responsibilities to the plaintiffs, as first holders of the bill of lading, were the same as were those of the shipowner, whilst the goods remained on board his vessel, and that, inasmuch as the master or the shipowner would not have been responsible to the plaintiffs for the value of the goods if delivered from the vessel to Messrs. Williams upon the directions of Messrs. Cottam, the defendants are in like manner free from any responsibility to the plaintiffs in respect of their delivery to Messrs. Williams upon the order of Messrs. Cottam. In my opinion this contention is well founded. It appears to me that, in the absence of any special circumstances, of which I can find no trace in the present case, the considerations, to which I have already adverted as applicable to the responsibilities of the shipowner, apply with at least equal force to the responsibilities of the dock proprietor, in whose warehouse the goods are deposited after being landed from the vessel. The respondents, however, contend that the responsibilities of the defendants, in respect of the deposit of the goods in their ware-

house, were regulated by the provisions of the Merchant Shipping Act, 1862, and that, under such provisions, the defendants were bound to hold the goods (subject to duties, to their own claim for rent, and to the shipowner's claim for freight) for the rightful holder of the bill of lading, and that, inasmuch as the plaintiffs alone filled that character, the delivery of the goods to Messrs. Williams was a wrongful dealing with the goods for which the defendants are responsible to the plaintiffs. In support of this contention, it has been urged that the deposit of the goods was not made upon the instructions or at the instance of Messrs. Cottam, as ostensible owners of the goods, but by the master, availing himself of the statute, and with the view of securing a continuance of his lien for freight after the goods were landed and warehoused, and that it was understood and intended by him, as also by Messrs. Cottam and the defendants, that the goods should be dealt with under the provisions of the statute.

Having regard to all the facts and circumstances of the case, I have arrived at the conclusion that the landing and warehousing of the goods was the result of an arrangement between the three parties, the master, as representing the shipowner, Messrs. Cottam, the consignees and ostensible owners of the goods, and the dock company. It may, I think, be assumed that the master, in entering into such arrangement, intended to secure a continuance of his lien for freight upon the goods, after they were deposited in the defendants' warehouses, and to obtain the benefit of all the provisions of the statute in that behalf; he was within the terms of the statute when he landed the goods, for, though entry had been made, the owner had failed to land or to take delivery of them; his notice of stoppage for freight was expressed to be given under the provisions of the statute, as was also the subsequent notice of removal after the freight had been paid.

What, then, was the effect of the arrangement so entered into by the master, Messrs. Cottam, and the dock company, and of the landing and warehousing of the goods consequent thereon? It appears to me that the rights of all parties, and their responsibilities also, were thenceforth regulated by the provisions of the statute so far, but so far only, as such provisions were applicable to the circumstances of the case, but that in all other respects their

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rights and responsibilities were the same as they would have been, had no such statute been in force.

If this be so, to what were the provisions of the statute applicable? It would appear to have been the object of the legislature to enable the shipowner, in a case in which the owner was not ready to take delivery, to land and warehouse the goods, and at the same time to preserve his lien for freight, but that it was not intended to interfere with the rights or responsibilities of persons interested, or claiming to be interested, in the goods, further than was necessary to attain that object. Under its provisions the shipowner may, in certain events, land the goods and deposit them in a warehouse and, by giving notice to the warehouse owner that the freight in respect of such goods has not been paid, may secure a lien upon them for its amount whilst they remain in the warehouse; and, in the event of such lien not being discharged, a sale may, or at the instance of the shipowner must, be made by the warehouse owner; should such a sale be made, the warehouse owner is to hold the surplus of the proceeds, after discharge of duties, rent, and freight, for the holder of the bill of lading.

It may well be in the present case that, if the lien for freight had not been discharged, the defendants would have exercised the power of sale given to them by the statute, and the several provisions of the statute applicable to such a state of circumstances would then have come into force; but there was no occasion for the exercise of any such power, inasmuch as the freight had been paid and the purpose for which the captain had concurred in the landing and warehousing of the goods had been accomplished.

The defendants had, doubtless, acquired under the statute a lien for their rent and for any expenses incurred by them in respect of the goods, but such lien could only be enforced in the usual way, viz., by detaining the goods until the claim was satisfied. I can find nothing in the statute which in terms, or, in my opinion, impliedly, declares or directs that, after satisfaction of the shipowners' lien and of their own, the dock company shall hold any goods delivered to them under its provisions for the holder of the bill of lading. On the contrary, it appears to me that, after such satisfaction, it was incumbent upon the dock company, and especially so in the

absence of any notice of right or title to the goods in any other person, to deal with them as directed by those who were the ostensible owners of them at the time of their deposit, and who, as such ostensible owners, had concurred in placing them in their custody; and that by so dealing with the goods the defendants have not come under any liability to the plaintiffs in the present action.

It has been further, or rather in the alternative, contended on the part of the respondents, that the defendants should be regarded as the bailees of Messrs. Cottam, and that, so regarded, they could have as against the plaintiffs no better title than their bailors, and could in no way justify the delivery of the goods upon their order; and this view of the case appears to have been regarded by Field, J., as its true result.

That the goods were landed and deposited in the defendants' warehouse at the instance of Messrs. Cottam, though with the concurrence of the captain, is, in my opinion, in accordance with the proved and admitted facts of the case; I assent also to the proposition that the defendants acquired no better title to the goods than that of Messrs. Cottam; but there is no question in the present case of any title to the goods in the defendants, it is clear that they never had any, nor has it been ever suggested that they had; the only question, as it appears to me, upon the hypothesis of the defendants being the bailees of Messrs. Cottam, is whether the defendants, having in their possession goods delivered to them by, and as the goods of, Messrs. Cottam, and to be disposed of according to the order of Messrs. Cottam, though in fact being the goods of the plaintiffs, can be held liable to the plaintiffs for disposing of them upon the order of Messrs. Cottam. I am of opinion that they cannot; they dealt with the goods in the ordinary course of their business as dock proprietors and warehousemen, and in the manner and for the purpose for which they were deposited with them. It is doubtless true, as was pointed out by Field, J., in his judgment, that the facts of the present case are in many respects different from those in *Hollins* v. *Fowler* (1); indeed in that case, it was held that there had been a conversion; but adopting the general views expressed by Lord,

(1) Law Rep. 7 H. L. 757.

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then Mr. Justice, Blackburn, in the course of the answer given by him to the question submitted to the judges by the House of Lords, I can arrive at no other conclusion than that the defendants have not in the present case been guilty of conversion.

I agree, therefore, with Lord Justice Bramwell in holding that the appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Murray, Hutchins, & Stirling.*

Solicitors for defendants: *Freshfields & Williams.*

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[IN THE COURT OF APPEAL.]

MORGAN *v.* REES.

Practice—County Court, Appeal—38 & 39 Vict. c. 50, s. 6—Request to Judge to take a Note—Application to compel Judge to sign Note or to hear Case—Adjournment of Trial in County Court—Order XXXVII., rule 26 of County Court Rules, 1875—Appeal—19 & 20 Vict. c. 108, s. 44.

Rule 26 of Order XXXVII. of County Court Rules, 1875, which enables parties to a county court action, "at any time before the action is called on, by consent and without payment of any trial fee, to postpone the trial to such subsequent court as the judge shall direct," does not enable such parties to adjourn the trial without the consent of the judge; and therefore where, after a cause has been adjourned by the judge, the parties by agreement amongst themselves further adjourn the trial without the sanction of the judge, he has jurisdiction to hear and dispose of the cause as if there had been no such further adjournment.

A request to a county court judge, at the commencement of the trial, and before any specific question of law has been raised, that he should take a note of the evidence, as it was an important case and might go to the superior Court, is not a sufficient request within the meaning of s. 6 of the County Court Act, 1874 (38 & 39 Vict. c. 50); and therefore a note which the judge afterwards took, and which he stated was an incomplete one, and not such as he would have taken if he had been requested to take a note of any specific question of law and of the evidence in relation thereto, is not a note taken under that section which the Court will order him to sign.

The right to appeal from an order of a divisional Court, discharging a rule for an order on a county court judge to hear an action, is not taken away because s. 44 of 19 & 20 Vict. c. 108, which substitutes such rule for a mandamus to the county court judge, enacts that, where any superior Court shall have refused such rule, no other superior Court shall grant it.

APPEAL from an order of the Divisional Court of Queen's

Bench (1) discharging a rule nisi for an order upon the county court judge of Cardiganshire, holden at Aberystwith, to re-enter and hear an action in that court, or to sign the notes which he had taken upon the trial of such action, in order that they might be used on appeal under 38 & 39 Vict. c. 50, s. 6.

It appeared from the affidavits that this action, which was brought in the Chancery Division of the High Court of Justice for the delivery up of certain mortgage and title deeds, was transferred to the county court of Cardiganshire, holden at Aberystwith, and came on for hearing in that county court on the 14th of May, 1880, when the county court judge heard part of the evidence for the plaintiff, and then adjourned the further hearing to the following court in June, at which the said judge heard further evidence for the plaintiff, which completed the plaintiff's case, and the judge then adjourned the cause to the July Court, which was held on the 16th of that month. Previously to the cause coming on to be heard on that day, the plaintiff's and defendant's solicitors, by consent in writing, adjourned the hearing to the court in August next; the managing clerk of the plaintiff's solicitor informed the registrar's clerk of such agreement to adjourn, who undertook to get the necessary entry made in the minute book, but the sanction of the judge to such adjournment was not obtained, nor was he consulted in the matter. The judge had frequently expressed his disapproval of the practice of the solicitors of the parties making such adjournments, and had given notice that he would put a stop to it, as it led to much inconvenience; and accordingly, at the court on the 16th of July he directed the cause to be called on, and after hearing the defendant's solicitor and the managing clerk of the plaintiff's solicitor, he refused to allow the adjournment and directed a nonsuit to be entered. The learned county court judge stated in his affidavit, which he made in answer to the present application, that in the interval between the June and July courts he had carefully considered the evidence, and had come to the conclusion that unless further evidence was adduced on behalf of the plaintiff he ought to direct a nonsuit; and that therefore, as

(1) 6 Q. B. D. 89.

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no further evidence was adduced at the July court, he nonsuited the plaintiff. (1)

When the case first came on for hearing at the May court, it seems that the solicitor for the plaintiff asked the judge to take notes of the evidence, saying that it was an important case and might be taken to the superior Court, but he did not specify any point of law with regard to which such notes were to be taken. The judge did take certain notes, a copy of which he supplied to the plaintiff's solicitor as a matter of courtesy, but he declined to sign them for the purpose of appeal under the statute 38 & 39 Vict. c. 50, as he had not been requested to take notes on any specific point of law, and the notes which he had taken were rough and incomplete, and not such as he would have taken if he had been requested to take notes of any question of law and of the evidence in relation thereto.

Cohen, Q.C. (*Tindal Atkinson*, with him), for the county court judge. There is a preliminary objection to hearing this appeal. The 43rd section of 19 & 20 Vict. c. 108, substitutes a rule or order of any superior Court for a mandamus to a judge of a county court for refusing to do any act relating to his office; and the 44th section of that Act enacts that when any superior Court shall have refused to grant a writ of certiorari or of prohibition to a judge, or such rule or order, "no other superior Court or judge thereof shall grant any such writ, or rule, or order." Then the Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), enacts in s. 20, that "Where by Act of Parliament it is provided that the decision of any Court or judge, the jurisdiction of which Court or judge is transferred to the High Court of Justice, is to be final, an appeal shall not lie in any such case from the decision of the High Court of Justice, or of any judge thereof, to her Majesty's Court of Appeal."

[BRAMWELL, L.J. The meaning of that provision in s. 44 of 19 & 20 Vict. c. 108, was only to prevent a party seeking such prohibition or order from going in case of refusal from one court

(1) The rule nisi was obtained under a misapprehension that the county court judge had ordered the cause to be struck out.

to another, as he might otherwise have done. The appeal is not prevented by that enactment.]

Then the Judicature Act, 1873 (36 & 37 Vict. c. 66), enacts in s. 45 that the determination of all county court appeals by a Divisional Court of the High Court shall be final unless special leave to appeal be given by such Court.

[BRETT, L.J. This is not an appeal from a county court, but from an order of the Divisional Court discharging a rule. It is an appeal from an original order of such Court.]

The appeal was then heard upon the merits.

Terrell, for the appellant. The cause had been adjourned over the 16th of July, when the county court judge had it called on, and the parties not being ready he non-suited the plaintiff. He had no power to do so if the cause had been properly adjourned. That depends on rule 26 of Order XXXVII. of County Court Rules, 1875, which gives the parties power to adjourn by consent, as follows:—"The parties to any action at any time before the action is called on, may by consent, and without payment of any trial fee, postpone the trial to such subsequent court as the judge shall direct, but on such subsequent court such fee shall be paid or the cause be struck out."

[BRETT, L.J. That does not enable the parties to postpone the trial without the judge being a party to the agreement.]

The parties may adjourn, but the judge is to fix the day at which it is to be heard, and that may be fixed after the case has been adjourned. The registrar's clerk undertook to make an entry of the adjournment, and the plaintiff's solicitor had a right to suppose that the cause would not be taken on the 16th of July. If, however, the judge had jurisdiction to deal with the case on that day, then it is asked that the case may be re-heard, or that the judge should sign the note he took, so that the plaintiff may be able to appeal. He was asked to take a note of the evidence, and he should have done so, and signed a copy of such note in compliance with s. 6 of 38 & 39 Vict. c. 50, which enacts that at the trial or hearing "the judge, at the request of either party, shall make a note of any question of law raised at such trial or

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hearing, and of the facts in evidence in relation thereto, and of his decision thereon," and he shall "furnish a copy of such note," "and he shall sign such copy, and the copy so signed shall be used and received," "at the hearing of such appeal." Then by Order, January 22, 1877, it is ordered that no motion under this 6th section shall "be made by way of appeal from any county court unless a copy of the judge's notes signed by the judge shall have been handed to the proper officer in court, unless otherwise ordered." Here notes were taken, and therefore even if the judge was not asked to take a note in conformity with the 6th section, the appeal might still lie: *Seymour* v. *Coulson* (1), and per Grove, J., in *Morgan* v. *Davis* (2); but still unless it be signed, or the Court otherwise order, there may be a difficulty in getting the appeal heard.

Cohen, Q.C., and *Tindal Atkinson*, for the county court judge. The judge was never called upon to take a note of any question of law, or he would have done so. What was said by the solicitor at the commencement of the trial about taking a note was too general. If a party can insist always on having a note taken of everything, county court cases could not be tried, therefore the section says, "shall make a note of any question of law raised at the trial." There must be some specific question of law raised, and a note of that and of the evidence in relation to it requested to be taken. It is not sufficient to say, as was said here generally, this is an important question, please take a note of the evidence. Then as to the rehearing, there can be no rehearing, for the county court judge directed a nonsuit, and neither the Divisional Court nor the Court of Appeal can have jurisdiction to direct the judge to hear again; it is not as if he declined jurisdiction.

Terrell replied.

BRAMWELL, L.J. I think this appeal must be dismissed. I think the learned county court judge heard the case, although perhaps he did not hear it in the most satisfactory way. It would have been better if he had said "I am going to decide this case, and if you want to address me upon it you must now do so." But I think he heard the case, and I do not think that he had no

(1) 5 Q. B. D. 359. (2) 3 C. P. D. 260.

jurisdiction to hear it on the day in question on account of its being further adjourned, because, as I construe the rule of court which has been referred to, the parties may adjourn by consent, but the judge must be a party to the arrangement, and they have no right to adjourn except with his sanction. He had therefore jurisdiction to hear the case, and he did hear it, whether in a very satisfactory way or not is not the question. He heard it, and did not decline jurisdiction. Therefore, I do not think we have any power now to call upon him to rehear the case.

As to the other matter. The statute seems to suppose that the point of law may be stated at once at the trial, and then a note taken of all the evidence; but it is obvious that a point of law may arise in the course of the case; or it may arise afterwards at the end; for instance, the defendant may say, "I see now the evidence is given that there is a point of law in this matter." What is the judge to do? To hear the evidence over again? I am sure I do not know. But, however, that is the statute, and it seems to say he must have notice of a point of law being taken and a request to take the evidence in relation to it. I cannot think that that was made in the present case. The plaintiff's solicitor said to him, "This is an important case; please take a note of the evidence." Perhaps it would have been as well in those circumstances if he had taken such a note as he could have signed afterwards, but I do not think that the plaintiff's solicitor technically took the proceeding that the statute makes necessary. Whether if the point was properly taken the judge could be allowed to say he did not take a note, or whether he could be made then to sign the note he may have taken, it is not necessary to consider, for I do not think in the present case that the point was properly made before him, and consequently he is not bound under the statute to sign his notes.

I may make this observation, but it is quite obiter, that it is by no means clear to me that an appeal would not lie now, and that the Court under the words "unless otherwise ordered," of the order of January, 1877, might not in their discretion allow an appeal without such signed notes, when the propriety of the judge's nonsuiting could be considered. However, that is quite obiter, and I think this appeal must be dismissed.

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BAGGALLAY, L.J. I think that no sufficient request to take a note was made to the judge under 38 & 39 Vict. c. 50. That Act contemplates that some specific question of law should be raised, and it is not sufficient merely to say, "This is an important question; please take a note." It perhaps would have been better if, upon a general request of that sort being made, the party making it had been required to state the specific point of law which was desired to be raised. But this was not done, and under those circumstances I am of opinion that no sufficient request was made within the statute, and though in fact the judge did take a note of some portion of the evidence he tells us he did not take the whole of the evidence, but he trusted to his memory for a part, and I think that the note he took was not a note taken under the statute, and one which he was bound to sign when required to do so.

Then, again, as regards the ultimate hearing, it appears on the first day in May a part of the evidence of the plaintiff had been brought under the judge's consideration. On the day of the adjournment in June further evidence was brought before him, and the evidence of the plaintiff was completed. At the court in July the judge declined to allow the case to be any further adjourned, and I do not gather that any request was made to him by those who were then before him to be heard by way of argument on the evidence which had been given. I think the judge therefore was acting within his jurisdiction in nonsuiting the party. Having regard to all the circumstances of this case, I should feel some regret at being compelled to arrive at this conclusion, were it not that it appears to me, as at present advised, that the plaintiff is not deprived of the right of appeal, and it will be within the jurisdiction of the Court to whom the appeal may be brought to consider whether the want of the signed note of the judge may not be supplied in some other way. Under all these circumstances I am of opinion this appeal should be dismissed with costs.

BRETT, L.J. In the first place I think this case was not properly adjourned. I think that according to this county court rule the parties cannot adjourn a case without the consent of the

judge. Moreover, I think the adjournment mentioned in such rule is not an adjournment of an adjourned case, but an adjournment before the case is called on originally; because the rule states that parties to any action at any time before the action is called on may by consent, and without payment of any trial fee, which is a payment made before the case is called on, postpone the trial to such subsequent court as the judge shall direct, but at such subsequent court such fee, that is, the trial fee, shall be paid or the cause be struck out. That seems to me to point to two things, first, that the adjournment mentioned in this rule must, as I have said, be before the cause is originally called on, and, next, inasmuch as the adjournment can only be to such subsequent court as the judge shall direct, the parties cannot adjourn the case effectually without his consent. That, I think, is a necessary implication from that rule. Therefore the present case was not adjourned over the day in July on which the judge sat. That there has been a practice of adjournment in that court to which the judge has objected, but which his officials seem to have countenanced, I cannot doubt, because the registrar's clerk did inform the parties that inasmuch as they consented to the adjournment he would enter it in the book, and that is not denied; therefore when the case came on on that adjourned day before the judge, and when both parties wished him to adjourn it, why under the particular circumstances he did not do so, I confess I cannot conceive, and I really think he should not have nonsuited the plaintiff without first hearing his solicitor argue the case. However he did in fact do so; the parties were there, and he awarded a nonsuit. He did not decline jurisdiction by so doing, but he assumed jurisdiction and acted upon it, and therefore it seems to me that under those circumstances neither the Divisional Court nor this Court has any power to order him to hear the case. If he had declined jurisdiction I should have thought we had authority to order him to hear it; but the very terms of the application, which are that he should re-hear, shew we have no jurisdiction.

Well, then, is there authority to order him to sign the notes? Now, after some hesitation, I think that the request was not sufficiently accurate or distinct to bring the case within the

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statute. However, the judge did take a note. If he had taken a full note, then, according to the case of *Seymour* v. *Coulson* (1), I should have thought it did not signify whether he signed it or not. He says it was not a sufficient note, and he has declined to sign it, and inasmuch as there was no proper request, I do not think the Court can order him to sign it, although for myself I am bound to express my surprise that he did not do so. I desire also to express my strong opinion that if, under the circumstances when the matter goes before the Court on appeal from the county court, they think that without a signed note they can hear the cause upon other materials, I cannot see why the appeal should not be heard.

Appeal dismissed.

Solicitor for appellant: *Griffith Jones.*

Solicitors for county court judge: *Bolton, Robbins, & Busk.*

Feb. 28.

(C. A.) Q. B. D.

[IN THE COURT OF APPEAL.]

McCOLLIN *v.* GILPIN AND OTHERS.

Company, Loan to—Agreement signed by Directors—Whether Directors personally liable.

By agreement between the T. Company and the plaintiff, the defendants, describing themselves as "we the undersigned, three of the directors," agreed to repay 500*l.* advanced by the plaintiff "to the company," and assigned to the plaintiff as security for the advance certain "machines and tools," which were the property of the company:—

Held, after hearing parol evidence to explain the ambiguity of the agreement, that the defendants were personally liable to repay the 500*l.*

APPEAL by the defendants from the decision of Lush, J., on further consideration (2), that the defendants were personally liable to the plaintiff upon the following agreement:—

"Agreement between the Tunbridge Iron and Boiler Works Company, Limited, of the one part, and William McCollin, Esq., of Hull, on the other part. In consideration for the advance of the sum of 500*l.* paid by the said William McCollin, Esq., to

(1) 5 Q. B. D. 359. (2) 5 Q. B. D. 390.

the said company, we, the undersigned, three of the directors of the said company, hereby agree to repay the said sum of 500*l.*, with interest at the rate of 5 per cent. per annum, in six calendar months from the date hereof. And we do hereby assign to the said William McCollin, as security for the said advance of 500*l.*, the machines and tools as invoiced to him 3rd June, 1878, the machines to be delivered in the same condition for working as they are now. And the said William McCollin hereby agrees not to remove the said machines and tools from their present position, except in default of the repayment of the said sum of 500*l.*, with interest at the rate of 5 per cent. per annum, at the expiration of six months from the present date.

"As witness our hands this 5th day of June, 1878."

This document was signed by the defendants and by the plaintiff, but not sealed with the seal of the company. The machines and tools therein mentioned were the property of the company.

The plaintiff having sued the defendants for money lent, the action was tried before Lush, J., without a jury, at the Leeds spring assizes, 1880, and he, after further consideration, gave judgment for the plaintiff, from which the defendants appealed.

Wills, Q.C., and *Lockwood*, for the defendants, cited *Magee* v. *Atkinson* (1); *Hall* v. *Ashurst* (2); *Agar* v. *Athenæum Life Insurance Company* (3); *Burrell* v. *Jones* (4); Lindley on Partnership, vol. i., p. 263; Brice on Ultrà Vires, pp. 637, 639.

Cave, Q.C., and *Dodd*, for the plaintiff, cited *Paice* v. *Walker* (5); *Miller* v. *Thompson* (6); *Lindus* v. *Melrose* (7); *Kay* v. *Johnson* (8); *Des Landes* v. *Gregory*. (9)

The Court (Bramwell, Baggallay, and Brett, L.JJ.), referring to *Macdonald* v. *Longbottom* (10) and *Acebal* v. *Levy* (11), observed

(1) 2 M. & W. 440.
(2) 1 C. & M. 714.
(3) 3 C. B. (N.S.) 725; 27 L. J. (C.P.) 95.
(4) 3 B. & Ald. 47.
(5) Law Rep. 5 Ex. 173.
(6) 3 M. & G. 576.
(7) 3 H. & N. 177; 27 L. J. (Ex.) 326.
(8) 2 H. & M. 118.
(9) 2 E. & E. 602.
(10) 1 E. & E. 977; 28 (L.J.) (Q.B.) 293; affirmed by Exchequer Chamber, 29 L. J. (Q.B.) 256.
(11) 10 Bing. 376.

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McCollin v. Gilpin.

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that parol evidence was admissible and desirable to explain the ambiguity of the agreement. In preference, however, to ordering a new trial, they directed certain witnesses on either side to attend for examination before the Court itself, and after hearing such witnesses, gave judgment for the plaintiff.

Appeal dismissed.

Solicitor for plaintiff: *E. Jukes, for Laverack, Hull.*

Solicitors for defendants: *Torr & Co., for Wells & Hind, Nottingham.*

March 5.

Q. B. D.

SOTHERON, Appellant; SCOTT, Respondent.

Bastardy—Order of Maintenance—Marriage of Mother after making of Order—Liability of putative Father.

An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother.

7 QBD 261
—265-6-8
9 QBD 239
241-2

Case stated by justices for Durham under 20 & 21 Vict. c. 43. On the 30th of August, 1873, an order was made at petty sessions whereby the appellant was adjudged to be the putative father of a bastard child of the respondent (who at the date of the birth and of such order was called Mary Jane Day and was a single woman), and whereby it was ordered that the appellant should pay to the respondent, the mother of the child (so long as she should live, &c.), or to the person who might be appointed to have the custody of such child under 7 & 8 Vict. c. 101, 2*s.* for the maintenance and education of the child until it should attain the age of thirteen years or should die, and the sum of 10*s.* for the expenses incidental to the birth of the child, and the sum of 8*s.* for costs incurred in obtaining this order. The appellant had due notice of the order, and from time to time made sundry payments to the respondent pursuant to it, but having neglected and refused, for the reasons hereinafter stated, to continue such payments, information and complaint was made on the 18th of September, 1880, before a justice, setting forth the fact of the order, and that the payments thereby directed to be made had not been made according thereto, and that

there was then in arrear the sum of 10s., being the amount of five weeks' payments. Upon such information and complaint a warrant was issued for the apprehension of the appellant for disobedience of the order, and he was brought before the justices in petty sessions on the 2nd of October, 1880, when it appeared that subsequent to the date of the order the respondent became the wife of one Robert Scott, who was still living. No evidence was given either that Scott, the husband of the respondent, had or had not the ability and means of maintaining and educating the child.

The justices being of opinion that the appellant was liable to make the payments under the order gave their determination against him, and decided that he had not shewn cause why the sum of 10s. should not be paid, and the same appearing to be due from the appellant under the order, together with the costs attending the warrant, apprehension, and bringing up of the appellant, they committed him to prison in default of sufficient distress.

The question for the opinion of the Court is, whether the marriage of the respondent with Scott subsequent to the date of the order had the effect of revoking or of suspending it during the continuance of the marriage, and of relieving the appellant from liability to make payments thereunder.

Cock, for the appellant. The question raised by the case is whether if the mother of a bastard child marries after obtaining an affiliation order under 35 & 36 Vict. c. 65 (1), she can enforce the

(1) The Bastardy Laws Amendment Acts, 1872 (35 & 36 Vict. c. 65), s. 3: "Any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth, or at any time within twelve months from the birth of such child, or at any time thereafter upon proof that the man alleged to be the father of such child has within the twelve months next after the birth of such child paid money for its maintenance make application for a summons to be served upon the man alleged by her to be the father of such child."

7 & 8 Vict. c. 101, s. 5: "Provided always that no order for the mainfenance or support of any bastard child shall, except for the purpose of recovery of money previously due under such order, be of any force or validity after the child, in respect of whom it was made, has attained the age of thirteen years, or after the marriage of the mother of such child, or after the death of such child." [Repealed by 35 & 36 Vict. c. 65, first schedule.]

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order against the putative father. *Stacey* v. *Lintell* (1), where it was held that the mother could not apply for an order after her marriage, differs from the present case, for here the order was obtained before the marriage of the mother. But the observations of Mellor, J., in giving judgment, are strongly in favour of the appellant. After holding that the mother was disqualified, inasmuch as she was not a "single woman" within 35 & 36 Vict. c. 65, s. 3, the learned judge says that the reasoning of *Lang* v. *Spicer* (2) is applicable to the case—that a woman who marries after the birth of her child ought not to be allowed to proceed against the putative father, for her husband having become liable to support the child, it could not have been the intention of the legislature to establish a double liability for its maintenance. And Lush, J., after stating that 4 & 5 Wm. 4, c. 76, s. 57, makes the husband liable to maintain the illegitimate child of his wife born before marriage, and that the proviso to 7 & 8 Vict. c. 101, s. 5—by which an order for the maintenance of a bastard child is to cease after the marriage of the mother—is repealed by 35 & 36 Vict. c. 65, expresses his opinion that the effect of repealing this section is merely to prevent an order becoming void on the marriage of the mother, and to leave it in the discretion of the justices to allow it to continue until the child has reached the prescribed age. Here there was nothing to shew that the husband was not able to maintain the child, and the justices ought to have inquired as to his ability before making the order against the appellant. The order is a grant in aid of the person liable to maintain the child.

Meek, for the respondent, was not heard.

FIELD, J. I think the order of the justices was right. I can find no enactment in 35 & 36 Vict. c. 65, imposing upon the justices, where the mother of a bastard child is married, the duty of inquiring whether her husband is of sufficient ability to maintain the child, before they proceed to enforce an order on the putative father. It may or may not be the law that they have a discretion, upon the hearing of a summons against the putative father to enforce payment, to take into account the means of the

(1) 4 Q. B. D. 291. (2) 1 M. & W. 129.

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woman's husband, where these are shewn to be sufficient to maintain the child. I should like to consider the point more fully when it arises. But here there was nothing in evidence before the justices as to the relative means of the father or the husband, and the order was clearly right.

MANISTY, J. I am of the same opinion. The only question is whether the order was revoked by the marriage of the mother, and as the law stands under 35 & 36 Vict. c. 65, I think it was not.

Judgment for the respondent.

Solicitors for appellant: *Purkis & Perry.*
Solicitors for respondent: *Crowdy, Son, & Tarry.*

[IN THE COURT OF APPEAL.]

March 11.

(C. A.)
Q. B. D.

ELLIS *v.* DESILVA.

Costs—Reference with Costs to abide "Event"—General Award in favour of Defendant on Counter-claim—Reference back to find Specific Issues.

The plaintiff, who had built two houses for the defendant at a contract price of 1135*l.*, sued for 169*l.* 16*s.*, the balance of the price, and for other small items.

The defendant raised various defences, and also counterclaimed 1200*l.* for penalties for delay and for damages arising from bad work. The pleadings went as far as surrejoinder, after which the cause, with all matters in difference, was referred to an architect as arbitrator, upon the terms, inter alia, that the costs of action, reference, and award, should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded 3*l.* 2*s.* 6*d.* to the defendant in respect of the action and matters in difference:—

Held, affirming the judgment of the Queen's Bench Division, that the word "event" ought to be construed distributively, and the award remitted to the arbitrator to find specific issues.

APPEAL from an order of the Queen's Bench Division, remitting an award to the arbitrator to find specific issues.

The writ was issued from the Liverpool District Registry. The plaintiff, a builder, had built two houses for the defendant at a contract price of 1134*l.* 5*s.* to be paid in accordance with the certificates of an architect from time to time to be given. The

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defendant had paid various sums on account until the unpaid residue amounted to 169*l.* 16*s.* 1*d.* A claim for this unpaid residue, supplemented by a claim of 7*l.* 11*s.* for money received by the defendant for sand or excavations, alleged to be the property of the plaintiff, and by a claim of 15*l.* as damages for loss of time caused to the execution of the work, was made up in the statement of claim to about 200*l.*

The defence consisted of general and specific traverses; and there was a counter-claim of 784*l.* 7*s.* as liquidated damages, under a clause in the building contract giving penalties at the rate of one guinea per day for delay, and of unliquidated damages in respect of loss which the defendant had suffered by reason of the plaintiff's breaches of contract in providing bad materials and in many other details. The pleadings went as far as surrejoinder, soon after which, the district registrar, upon hearing the parties and by consent, ordered that the action and all matters in difference between the parties should be referred to the "award order, arbitrament, final end, and determination," of Mr. William Weightman, a Liverpool architect. The order of reference, which was upon a common printed form, and gave the arbitrator all the powers as to certifying and amending of a judge at nisi prius, contained the following clause:

"And by the like consent, I further order that the said parties shall in all things abide by, perform, fulfil, and keep such award, so to be made as aforesaid, and that the costs of the said action, and of the reference and award, shall follow the event unless, upon application made at the reference for good cause shewn, the arbitrator shall otherwise order."

After hearing a considerable body of evidence on both sides, the arbitrator made his award, which, after certain recitals, proceeded as follows: "I find and award that there is due from the plaintiff to the defendant the sum of 3*l.* 2*s.* 6*d.* in respect of the said action and in respect of all matters in difference between them."

The defendant, having signed judgment for this amount and costs, carried in his costs for taxation; but the plaintiff afterwards took out a summons before Pollock, B., to remit the award to the

arbitrator to find specific issues, in order that the costs might be apportioned. The summons having been referred by the learned judge to the Court, the Queen's Bench Division made an order in favour of the plaintiff in the terms thereof, and from this order the defendant appealed.

February 16. *Bigham*, for the defendant. First, this award is conclusive, not being invalid on the face of it, and it must be assumed that the arbitrator found all the issues in favour of the defendant. Secondly, however the issues may have been in fact found, the event is in favour of the defendant, and therefore he becomes entitled to costs by the very terms of the reference: *Chatfield* v. *Sedgwick*. (1) The use of the word "event" gets rid of all questions as to specific issues.

[BRAMWELL, L.J. It is true that under the present system of pleading it may sometimes be a very difficult matter to eliminate the issues.]

That is so; and it will be especially difficult in the present case, in which the pleadings go on to surrejoinder.—[He also relied on the judgment of Field, J., in *Stooke* v. *Taylor*. (2)]

Henry Sutton, for the plaintiff. First, this award is uncertain and insufficient, and therefore invalid. It is impossible to see how the 3*l*. 2*s*. 6*d*. is made up. Before the Judicature Acts, it was always the practice for the arbitrator to find specific issues, and such was the practice before the Common Law Procedure Acts: *Kilburn* v. *Kilburn*. (3)

Secondly, "event" must be read distributively: *Myers* v. *Defries*. (4) *Cole* v. *Firth* (5) shews the form of order which ought to have been made as to costs. The plaintiff should have had the general costs of the action, and the defendant the costs of proving the counter-claim.—[He also relied on the judgment of the majority of the Court in *Stooke* v. *Taylor*. (2)]

Bigham, in reply. There is no obligation upon an arbitrator to go through the issues and award specifically upon them: Russell on Arbitration, 5th ed. p. 338. It may be that the plaintiff

(1) 4 C. P. D. 459.
(2) 5 Q. B. D. 569.
(3) 13 M. & W. 671.
(4) 5 Ex. D. 180.
(5) 4 Ex. D. 301.

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might have gone before the arbitrator and claimed the general costs of the action separately, but it is too late to claim them now.

Cur. adv. vult.

March 11. BRAMWELL, L.J. In this case, the claim, counter-claim, and all matters in difference, were referred to an arbitrator by an order of reference containing a general clause to the effect that costs were to abide the event. The arbitrator simply awarded a small balance to the defendant. This may mean that the plaintiff had no cause of action, but it may also mean that the plaintiff's claim was substantiated to a certain amount, but that this amount was overtopped by the counter-claim which the defendant made good. In fact, about a dozen combinations may be imagined, each of which may possibly explain the award. It is therefore argued on behalf of the plaintiff that the word event ought to be read distributively, as if the term "events" had been employed, and the Court below so found. It cannot be denied that this is the general interpretation of the term, and I see nothing in this particular case to make another interpretation the correct one. I am of opinion that the plaintiff's contention is right, and that the reason of the thing is to treat "event" distributively. The award therefore must go back for the arbitrator to amend it by finding specific issues.

BAGGALLAY and BRETT, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Chester & Co., for Wright, Becket, & Co., Liverpool.*

Solicitors for defendant: *W. W. Wynne & Son, for T. & T. Martin, Liverpool.*

THE MAYOR, ALDERMEN, AND BURGESSES OF THE TOWN AND BOROUGH OF ROCHDALE *v.* THE JUSTICES OF THE PEACE FOR THE COUNTY OF LANCASTER.

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March 16.

Q. B. D.

Highway—Repair—Disturnpiked Roads—Main Roads—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13 enacts that any road which has "between the 31st of December, 1870, and the date of this Act ceased to be a turnpike road . . . shall be deemed to be a main road, and one-half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate."

The corporation of the town and borough of R. were the highway authority of the R. highway area. Under ss. 47–50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as came within the area of the "town" were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local Act in 1872 the boundaries of the borough were enlarged, and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads thus for the first time brought within the area of the borough were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads:—

Held, by Watkin Williams and Mathew, JJ., that the further portions of the turnpike roads brought within the enlarged borough area by the local Act of 1872, though they had ceased to form parts of the turnpike roads, were not main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, since that section contemplated only the cesser or extinguishment and winding-up of turnpike trusts, and did not apply to a case where the portions of roads in question only ceased incidentally to form part of the turnpike trusts.

SPECIAL CASE stated by consent. The facts appear in the judgment.

March 12. *Sir H. Giffard, Q.C.* (*Crump*, with him), for the plaintiffs.

Gorst, Q.C. (*H. F. Blair*, with him), for the defendants.

Cur. adv. vult.

March 16. The judgment of the Court (Williams and Mathew, JJ.) was delivered by

WILLIAMS, J. The plaintiffs are the highway authority of

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Q. B. D.

the Rochdale highway area, and the defendants are the county authority of the county of Lancaster, within which the said area is situated: and the question in this case is whether the plaintiffs, as such highway authority, are entitled to call upon the county authority, under the 13th section of the Highways and Locomotives (Amendment) Act, 1878, to contribute half of the expenses of maintaining certain portions of certain roads included within the said highway area, by reason of the said portions of roads having been, as it is alleged, disturnpiked within the meaning of the said section.

The inhabitants of the town of Rochdale were incorporated by royal charter in the year 1856, under the title of the mayor, aldermen, and burgesses of the town and borough of Rochdale. The "town" at this time included "all places within a radius of three-quarters of a mile from the Old Market Place." Previously to its incorporation the town of Rochdale had been governed by commissioners under a local Act, and upon its incorporation all the rights, powers, estates, and property, and all the liabilities and obligations of the commissioners were transferred to and imposed upon the new corporation. Amongst those rights and liabilities were the following (as stated in paragraph 8 of the special case):—

"By the Rochdale Improvement Act, 1853, s. 85, the Towns Improvement Clauses Act, 1847, ss. 47, 48, 49, and 50 were (inter alia) incorporated therewith. These sections are as follows:—

"Sect. 47: The management of all the streets which at the passing of the special Act are, or which thereafter become public highways, and the pavements and other materials as well in the footways as carriage ways of such streets, and all buildings, materials, implements, and other things provided for the purposes of the said highways by the surveyors of highways or by the commissioners, shall belong to the commissioners.

"Sect. 48: The commissioners, and none other, shall be the surveyors of all highways within the limits of the special Act, and within those limits shall have all such powers and authorities, and be subject to all such liabilities, as any surveyors of highways are invested with or subject to by virtue of the laws for the time being in force, and the inhabitants of the district within the said

limits shall not, in respect of any lands situate within the said district, be liable to the payment of any highway rate, grand jury cess, or other payment in respect of making and repairing roads within the other parts of the parish, township, barony, or place, in which the said district or any part thereof is situate.

"Sect. 49: "The commissioners shall be deemed guilty of a misdemeanor for refusing or neglecting to repair any public highway within the limits of the special Act, and shall be liable to be indicted for such misdemeanor in the same manner as the inhabitants thereof, or of any parish, township, or other district therein were liable before the passing of the special Act.

"Sect. 50: The trustees of any turnpike road shall not collect any toll on any road within the limits of the special Act, or lay out any money thereon."

Several of the roads entering Rochdale were turnpike roads, and under the above-mentioned sections of the Towns Improvement Clauses Act, such portions of the said turnpike roads as came within the area of the town were taken out of the Turnpike Trusts, and the obligation to repair the same imposed upon the commissioners, and more recently upon the corporation.

This was the state of things down to the year 1872. In that year an Act was passed called the Rochdale Improvement Act, 1872, by which the boundaries of the municipal borough were enlarged and made coextensive with the boundaries of the parliamentary borough as specified in the Boundary Act, 1868; and further, by this Act all the provisions of the Acts theretofore in force relating to the "town" were extended to and became applicable to the enlarged area of the borough.

The effect of this was that the further portions of the said turnpike roads, now for the first time brought within the area of the borough, were taken out of the Turnpike Trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads, and the question is whether they have so ceased and have become main roads within the meaning of the 13th section of the Highways and Locomotives (Amendment) Act, 1878, so as to entitle the highway authority of the area in which they are situated to claim from the county authority half of the expenses of their repair.

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The section in question is as follows :—

"Sect. 13: For the purposes of this Act, and subject to its provisions, any road which has, within the period between the thirty-first day of December, one thousand eight hundred and seventy, and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one half of the expenses incurred from and after the twenty-ninth day of September, one thousand eight hundred and seventy-eight, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction.

"Provided that no part of such expenses shall be included in—

"(1.) Any precept or warrant for the levying or collection of county rate within the metropolis, subject and without prejudice to any provision to be hereafter made; or

"(2.) Any order made on the council of any borough having a separate court of quarter sessions under section one hundred and seventeen of the Municipal Corporation Act, 1835.

"The term 'expenses' in this section shall mean the cost of repairs defrayed out of current rates, and shall not include any repayment of principal moneys borrowed, or of interest payable thereon."

The said portions of roads undoubtedly, upon being brought within the area of the borough upon the enlargement of its boundary, were entirely taken out of the turnpike trusts, and ceased to form parts of the turnpike roads; but we think that it cannot be correctly stated that they ceased, within the meaning of this section, to be turnpike roads so as to have become main roads.

We think that the section does not apply to such a case, and that it contemplates only and provides for the case of the cesser or extinguishment and winding-up of turnpike trusts, and enacts that in such case the disturnpiked road shall become a main road, for the expenses of repairing which the highway authority, upon whom the obligation would primarily fall, should be entitled to be reimbursed to the extent of one-half by the county authority, and that it does not apply to a case like the present, where the portions of roads in question have only ceased to form part of the turnpike trust incidentally by their absorption by and transfer to another jurisdiction, with an express provision for their maintenance and repair different from that which would have applied to them had they become main roads.

We therefore come to the conclusion that the roads in question are not main roads within the meaning of the statutes, but are highways within the borough area, the burden of repairing which is thrown exclusively upon the borough authorities.

Judgment for the defendants.

Solicitors for plaintiffs: *Norris, Allens, & Carter, for Z. Mellor, Rochdale.*

Solicitors for defendants: *Ridsdale, Craddock, & Ridsdale, for F. C. Hulton, Preston.*

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(C. A.)
Ex. D.

[IN THE COURT OF APPEAL.]

YEWENS, APPELLANT: NOAKES, RESPONDENT.

Revenue—Inhabited House Duty—Exemption—"Servant or other Person"—32 & 33 Victoria c. 14, s. 11.

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The respondent was a hop-merchant, and was possessed of certain houses having an internal communication throughout, and used for the purposes of his trade. K. lived in the houses in order to take care of them, but he was a clerk in the respondent's employ at a salary of 150*l.* a year, and he resided in the houses together with his wife, children, and servant:—

Held, that K. was not "a servant or other person" within the meaning of 32 & 33 Vict. c. 14, s. 11, and that the respondent was not exempt from inhabited house duty in respect of the houses.

APPEAL from the judgment of Kelly, C.B., and Pollock, B., on a case stated under 37 & 38 Vict. c. 16.

At a meeting of the commissioners for the division of Southwark, Surrey, held on the 16th day of February, 1877, C. Noakes, hop-merchant, appeared by his agent against a charge for inhabited house duty of 500*l.* at 9*d.* per pound upon the houses Nos. 11 and 13, Southwark Street, Borough, for the year 1876–7, such houses having an internal communication throughout, upon the ground that they were solely used for trade purposes, and only otherwise occupied by a caretaker.

It appeared in evidence that Kepell, a clerk in C. Noakes's employ at a salary of 150*l.* per annum, with his wife, five children, and a servant girl about thirteen years old, occupied five rooms on the upper portion of the premises, three on the second-floor, and two attics, coals and gas free, and that his wife and the girl cleaned the offices in the building. Kepell was only occupying so many rooms until some of them with three others were let, although he had resided in them for two years and a half without being disturbed: it was also stated he had been placed there in consequence of a fire having occurred on the premises a short time before taking up his abode in them. Kepell admitted having received 10*l.* advance of salary about twelve months before removing into the above premises, but none since.

The commissioners, considering that the premises were solely

used for trade purposes, and believing Kepell's position to be simply that of a caretaker, allowed the exemption claimed (1), but the surveyor of taxes declared his dissatisfaction with their decision, and required them to state and sign a case for the opinion of the High Court of Justice.

The Exchequer Division having given judgment for the respondent, the surveyor appealed.

March 1, 6. *Sir H. Giffard, S.G.*, and *A. V. Dicey*, for the appellant.

McIntyre, Q.C., and *W. Graham*, for the respondent.

The arguments are sufficiently noticed in the judgments.

Cur. adv. vult.

March 16. The following judgments were delivered:—

BRAMWELL, L.J. I think that this appeal must be allowed. The building in question is subject to duty, unless it comes within the exception relied upon. I do not desire to lay too much stress upon the fact that the burden of proof lies upon the respondent, and that this is not a case in which a tax is being imposed upon the subject, but a case in which a tax being imposed upon the community, the subject is endeavouring to get rid of it by exemption; nevertheless I cannot help remarking that it is for the respondent to shew that he falls within the exemption, and, in my opinion, he fails to do this. Upon looking into the statutes which have been passed one after another, the object of them appears to have been to remove that which was practically a special tax upon particular trades, owing to the circumstances under which they are carried on; for instance, if a trade could not be carried on without a warehouse for the produce of the trader's manufacture or for what he dealt in, and if the possession of that warehouse involved the necessity of having a caretaker, to charge that warehouse,

(1) By 32 & 33 Vict. c. 14, s. 11, "from and after the 5th day of April, 1869, any tenement, or part of a tenement, occupied as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandize therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement, or part of a tenement for the protection thereof."

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when there would be no analogous tax upon a trade which did not require such a caretaker, would be evidently a tax upon the particular trade, just as though a particular burden had been put upon it. The legislature saw this inconvenience, and from time to time it has recognised that there must be a caretaker in the day-time, and that there must be a caretaker in the night-time, and that if a man is to take care of a house, he must be at liberty to dwell there; that is to say, it is unnecessary that he should have some other place for his true dwelling, at which, under the earlier state of the law, he would have had to sleep, and at which afterwards, when he was at liberty to sleep at the building of which he took care, he could go to take his meals. The legislature preferred to make an exception rather than that a particular trade should be taxed under the inhabited house duty, because it required the employment of a caretaker for the houses in which it was carried on. In the present case the caretaker resides in the house with his wife, with a servant, and with some children; how can it be said that this state of things is within the reason or the principle of the legislation, to which I have called attention? It is to be observed that this is not legislation for the benefit of the caretaker, it is legislation for the benefit of the trader. As was pointed out by the learned counsel, if the argument in favour of the respondent could prevail, the Crown might lose the benefit of the tax on an inhabited house, which otherwise it would get, from the circumstance that the caretaker would occupy an inhabited house, subject to duty. It may be said, are married men not to be caretakers? I do not say that they are not to be, but what I say is, that the houses which they take care of must not be the dwellings of themselves and their families; and that if they are made the dwellings of themselves and their families, the case is not within the exemption, which supposes an exemption in the case of a caretaker only. I think that the meaning of the expression in the Act of Parliament is plain; it says, "servant or other person," by which I understand this, that the "other person" may not exactly occupy the position of a servant; he may have undertaken the duty of taking care for the proprietor of the building, but not necessarily because he is a servant. A servant is a person subject to the command of his master as to the manner in which he shall

do his work. I think the statute means that the "other person" employed to take care shall be a person who has entered into a contract for that purpose, or who has entered into a contract of service for that purpose. I think, therefore, that this case might be decided on the general considerations to which I have endeavoured to give expression. But as to this particular case, with very great deference to those who think otherwise, it does seem to me impossible to hold that this particular case can be within the intention, or within the spirit, or even the words of the Act of Parliament. Here are a man and his wife and children, having a servant, residing within this building, which, as far as they are concerned, is as much an occupied dwelling-house to the extent to which they occupy it, as a part of a house can be; and it is impossible to say that this person is not residing, or having the benefit of a residence, with his family, in the house. I think, therefore, that whether we look at those general principles to which I have adverted, or to the circumstances of this particular case, it is not within the statute. I did intend to make one further remark, and that is, that I really do not see where the doctrine contended for is to stop. If, because a man may reside in a house, his wife, his children, and his servant may reside there without rendering the house liable to duty, why may not he have his father and his mother? Why may he not have the children of his wife by a former husband; and why may he not have his wife's father and mother? and why not any number of relations and friends that his sense of benevolence may induce him to make a part of his family? I really cannot see the limit.

Under these circumstances in this case I think the appeal should be allowed.

THESIGER, L.J. I agree that this appeal should be allowed, but not entirely upon the same grounds as those stated by Bramwell, L.J. I cannot bring myself to think that the exemption from inhabited house duty, which trade premises enjoy, is necessarily lost from the fact that the caretaker is put in possession and occupation of the house with his wife and family. And I found my view upon a consideration, partly derived from previous legislation in pari materia and the practice of the commissioners

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under such legislation, and partly derived from the views and habits of the community, with reference to which Acts of Parliament ought to be construed, and with reference to which also it appears to me that the practice of the commissioners has been founded.

Now, as regards previous legislation, the first Act with which it is necessary for me to deal is the Act 48 Geo. 3, c. 55. Under that Act inhabited house duties were imposed in respect both of trade premises, subject to certain qualifications which I need not discuss, and of dwelling-houses also, and the only exemption bearing upon the point amongst those given by that Act, and to be found in schedule B. to the Act, was an exemption in the following terms: "Every house whereof the keeping is, or shall be, committed or left to the care or charge of any person or servant, who doth not pay any rates to the church and poor, and who resides therein for the purpose only of taking care thereof." Then there is a provision, "Provided that an assessment shall be duly made in every such case, and the fact be truly returned in the manner directed by this Act in other cases of exemption from the said duties, and the exemption be allowed by the commissioners for executing this Act."

That is an exemption which relates to houses not occupied for the purpose of dwelling by the owners or occupiers of those houses, and also to trade premises which may for the time be unoccupied, and therefore it provides that where there is nobody left in that house but a "person or servant who doth not pay rates to the church and poor," and who resides in the house "for the purpose only of taking care thereof," there shall be an exemption. Now, it appears to me that if we were called upon to construe that Act, bearing in mind what are the manners and habits of the community, we should not be justified in saying that the exemption granted by that Act would be lost, merely by the fact of the caretaker living in the house with his wife and family. We know very well that if we were to take all the houses in the metropolis, unoccupied except by caretakers, in a vast majority of those houses so occupied by caretakers we should find that the caretaker goes into the house, and goes into the house with his little bedding and furniture, and with his wife and children; and I may

say that it is stated to us that not only under that Act, but under the Act which we have to consider, it has been the practice of the commissioners, where it is clearly and obviously a case of an ordinary caretaker taking his wife and family with him merely because they have no other place of residence, and where the wife and family are not engaged in any occupation, but are simply appendages to the caretaker and assisting him in taking care of the house, to exempt houses, the caretakers of which are in those houses under such conditions. While it is true that we have no right to construe the Act itself by the practice which has taken place under that Act, it is equally true that we are entitled to construe that Act, not only upon the actual words used, but with reference to the practice which had grown up and was existing at the time when that Act was passed.

Now, that being the original Act, we pass on to the Act 57 Geo. 3, c. 25, under which trade premises were exempted from inhabited house duty. At that time it was thought desirable that that exemption should be guarded by this restriction, namely, that no person should reside in the houses except in the day-time, and for the purpose of trade. The words are, "no person inhabiting, dwelling, or abiding therein, except in the day-time only, for the purpose of such trade."

That being the position of trade premises under that Act, it appears to have been felt by the legislature that that restriction was too strong, and that there ought to be some exemption under which the trade premises might be watched and guarded and protected in the night-time as well as in the day-time while trade was being carried on, and accordingly 6 Geo. 4, c. 7, dealt with that matter. By s. 7 it recited, "And whereas it may be expedient for the protection of property to extend the provision last mentioned to other cases of houses, tenements, or buildings within the exemptions in the said Acts described for the purpose of watching and guarding the same in the night-time, Be it further enacted that upon all assessments of the said duties to be made for any year commencing from and after the fifth day of April, 1825, it shall and may be lawful for the commissioners, acting in the execution of the said Acts, and of this Act in their respective districts, and they are hereby authorized and empowered,

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at the instance and request of any occupier or occupiers of any house, tenement, or building for which exemption from the said duties is provided, and shall be duly claimed and allowed under the provisions of the said Acts, to grant to any such occupier or occupiers a licence in writing, signed by any three of such commissioners at a meeting and in the manner by the said first mentioned Act prescribed, authorizing such occupier or occupiers to appoint any one of his or her servant or servants named in such licence to watch and guard such house, tenement, or building in the night-time, and that the abiding of such licensed servant therein for the purpose only of watching and guarding the same under such licence, shall not render the occupier thereof liable to the duties by the said Acts granted for the year in which such exemption shall be allowed."

If we stop there for one moment, it will strike us that if my view be right as regards the Act 48 Geo. 3, c. 55, an exemption such as I have just read in 6 Geo. 4, c. 7, may be held to include the case of a servant going into the trade premises for the purpose of protection, residing there during the night, and residing there in the sense which I have put upon that term in the first Act, namely, residing with his wife and family; and therefore we would suppose that, if my view be correct, some provision would be contained in this Act to the effect that the exemption should not extend so far as I have stated; and that is exactly what we find in the Act, because it says, "And which licence shall not in any case extend to authorizing any servant or servants to be named therein or any part of his or her family to inhabit or dwell in any such house, tenement, or building as a place of residence, anything in the said Acts contained to the contrary notwithstanding." No doubt it may be said of this section and of this provision, as it may be said of all similar sections and similar provisions, that that provision may have been put in ex majori cautela; but, on the other hand, bearing in mind the practice of the commissioners then existing, by which they allowed exemptions in cases of caretakers with their wives and families, it appears to me that this Act strongly confirms the view that, except in cases where the legislature has expressly provided it, the exemption of an ordinary caretaker would be an exemption

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which might extend not only to the caretaker but to those residing in the ordinary manner with their wives and families. Therefore when we come to the existing Act, the restrictive exemption is removed altogether, for it is allowed, whereas before it was not allowed, for caretakers to dwell in the premises themselves and to reside in the ordinary sense in which a man would reside in and occupy premises. We find that there is no restriction as regards the wife and family, but that the words used by the legislature are very similar to those used in the original Act, 48 Geo. 3, c. 55, and under which it had been the invariable practice of the commissioners to allow the wives and families to reside with the caretakers. The words of 32 & 33 Vict. c. 14, s. 11, are "from and after the fifth day of April one thousand eight hundred and sixty-nine, any tenement or part of a tenement occupied as a house for the purposes of trade only or as a warehouse for the sole purpose of lodging goods, wares, or merchandize therein, or as a shop or counting-house or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof." Therefore, stopping at this point, it appears to me that if this were a case of an ordinary caretaker, the mere fact of that caretaker residing in the trade premises with his wife and family would not exclude the occupier of the trade premises from the exemption which is given by these Acts. But it appears to me that the present is not, upon the facts stated to us by the commissioners, the case of an ordinary caretaker. It is the case not merely of a man who goes into one or two rooms in the basement story of the house, for the ordinary purpose of guarding the premises and cleaning them up in the morning, but of a man who occupies with his wife and family a considerable portion of the sitting-rooms and bed-rooms of the dwelling, and occupies them also not merely with his wife and family but with a servant for the purpose of attending upon him and his family. Therefore, upon this ground alone, it appears to me that there is sufficient reason for allowing this appeal.

But there is another ground upon which I am of opinion that this appeal should be allowed. The words of s. 11 of 32 & 33 Vict. c. 14, include the case of a "servant or other person." Now,

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what is the meaning of the legislature when they use those words? It appears to me that the legislature, in using the term "servant," is using that term in the ordinary and popular sense of it, that is to say, not in the sense in which any clerk or manager is called the servant of his employer, or in the sense in which the judges might be said to be the servants of the Crown, but in the sense of the ordinary menial or domestic servant, and that is made more clear by the Act of 6 Geo. 4, c. 7, s. 7, to which I have referred already, which speaks of a man or woman putting into premises "his or her servant or servants."

Then if that be so, what is the meaning of the words "other person"? Now definitions are proverbially dangerous, and I do not propose to define exactly what the words "other person" may mean, but this I think is obvious, that by the words "other person" is intended some person of the same kind and description as a servant, standing somewhat on the same footing, and subject to the same conditions; and I think a very good illustration was given by the Solicitor-General when he referred to the not uncommon case of a policeman being put into an unoccupied house or trade premises for the purpose of watching and guarding them. But if that be the proper meaning, as I think it is, of the words "servant or other person," then it is obvious that a clerk with a salary of 150*l.* a year does not come within such words. If he did, where is the construction to stop? The manager of a bank, a foreman with high wages, persons in the position almost of gentlemen, might be put in to take care of premises, and then it might be said that those particular premises were subject to the exemptions contemplated by the Act.

On these grounds, therefore, first, on the ground that even if this man had not been a clerk, he was not within the exemption, because he was in the premises with his wife and family and a servant, and secondly, upon the ground that being a clerk with a salary of 150*l.* a year, he is not in the position of a "servant or other person" contemplated by the Act, it appears to me that this appeal should be allowed.

I would merely add that with reference to the difficulty which there must be of drawing the line between cases under this Act, I would say that the commissioners must no doubt decide the points

which come before them as regards these matters; and if in this case they had distinctly found as a fact that the caretaker, in this particular instance, was simply the caretaker, and was a "servant or other person" within the Act, although we might think the decision was erroneous, I do not think we should be justified in interfering with it; but in this case, under the terms of the special case, the object of the commissioners appears to be to submit to the Court the very question, and that being so, we are justified, notwithstanding their belief that this was the case of a caretaker, in deciding in the way in which we have done.

BAGGALLAY, L.J. I agree in thinking that this appeal should be allowed, but I prefer to rest my decision upon the ground that, upon the facts stated in the special case, Mr. Kepell cannot be regarded as a "servant or other person" dwelling in the tenement in question for the protection thereof, within the intention and meaning of the statute. Without expressing any considered opinion as to whether, if Mr. Kepell could be regarded as a "servant or other person," his dwelling upon the premises together with his wife and the other members of his family, would deprive the respondent of the right to claim exemption, I should be disposed to doubt whether that circumstance alone would deprive him of his right to exemption.

I abstain from stating the grounds upon which I hold that Mr. Kepell was not a "servant or other person" within the meaning of the Act, because they have been already stated by Thesiger, L.J., with whose remarks upon this part of the case I entirely agree.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Saffery & Huntly.*

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March 18.

Q. B. D.

BOWYEAR *v.* PAWSON.

Set-off—Liability of Surety—Debt due to Principal.

Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant; and that Wilson had assigned the plaintiff's debt to himself and the defendant in equal shares as tenants in common. As to one half of the plaintiff's claim the defendant claimed to set off one half of the debt so assigned, and as to the other half, the defendant said that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and was entitled to set off the share remaining vested in Wilson against this part of the plaintiff's claim:—

Held, by Watkin Williams and Mathew, JJ., that the defence was no answer to the plaintiff's claim.

DEMURRER to a statement of defence by way of set-off and counter-claim.

The statement of claim alleged that by deed of the 6th of June, 1879, the defendant covenanted with the plaintiff to pay and discharge all liabilities which the plaintiff had incurred, or might thereafter incur or be liable for, under a deed of arrangement of the 20th of August, 1878, made between Myers Brothers and the plaintiff. It alleged that the plaintiff had incurred such liabilities and a default by the defendant in paying and discharging the same.

The material parts of the statement of defence were as follows:—

2. The deed of the 6th of June, 1879, mentioned in paragraph 1 was made between the plaintiff and the defendant, together with Samuel Wilson and John Vowler, and was for the purpose, amongst other matters, of releasing the plaintiff from certain liabilities incurred by him on behalf of a partnership then existing between him and Vowler. The consideration for this release was that the plaintiff had agreed to retire from the business, leaving the same to be carried on by Vowler alone.

3. The defendant accordingly, with Wilson and Vowler, entered

into a joint and several covenant to pay and discharge all the claims and liabilities of the plaintiff as mentioned in the statement of claim.

8. By way of set-off and counter-claim the defendant says that before the commencement of this action the plaintiff was indebted to Wilson in the sum of 811*l.* paid by him for the plaintiff at his request in respect of a debt due from the plaintiff to the Royal Exchange Assurance Company. And by an indenture made on the 8th day of November, 1880, Wilson, in consideration of the payment to him by the defendant of the sum of 371*l.* 6*s.* 2*d.*, assigned the said sum of 811*l.*, with interest, to himself and the defendant in equal shares as tenants in common.

9. In respect of a moiety of the plaintiff's claim, the defendant says that the share of the said sum of 811*l.* with interest so assigned to him, is in excess of a moiety of the plaintiff's claim. In respect of the other moiety of the plaintiff's claim, the defendant says that he is entitled to be exonerated by his co-surety, Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and says that the share of the sum of 811*l.* and interest remaining vested in Wilson is in excess of the other moiety of the plaintiff's claim.

10. The defendant claims, therefore, to set off the two moieties of the said sum of 811*l.* with interest, against the two moieties of the plaintiff's claim, if any.

March 15. *Gore*, for the plaintiff. This is an attempt made after action to set off claims due from the plaintiff to another person against the plaintiff's demand, and there is no authority, either in law or equity, for such a course.

Castle, for the defendant. The debt due from the plaintiff has been assigned to the defendant and Wilson. As to one moiety of this, the defendant could, on notice of the assignment, bring an action, but he can plead an equitable set-off without notice. As to this half, Wilson is in the position of a trustee for the plaintiff, and *Cochrane* v. *Green* (1) is an authority that where the defendant, through a trustee, has a money demand against the plaintiff, which but for the intervention of the trustee would have constituted

(1) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.

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a good legal set-off, he can plead it as an equitable set-off. As to the other half, suppose the defendant pays in this action the demand, he will lose his remedy against Wilson, who will claim that the action should have been defended on the ground of Wilson's set-off against the plaintiff: *Bechervaise* v. *Lewis.* (1) The surety when sued is entitled to shelter himself behind his principal: *In re Moseley Green Coal and Coke Co., Limited. Barrett's Case* (No. 2). (2)

Gore, in reply. In *Bechervaise* v. *Lewis* (1) there were three elements which are wanting here. The plaintiff there withdrew the very money which was intended to meet the liability for which the defendant made himself surety. The claim and set-off arose out of the same transaction, and in this case it is not a question of set-off, as the release may contain something which raises a claim to unliquidated damages: *Hardcastle* v. *Netherwood* (3); *Morley* v. *Inglis* (4); *Pellas* v. *Neptune Marine Insurance Co.* (5)

Cur. adv. vult.

Mar. 18. The judgment of the Court (Watkin Williams and Mathew, JJ.), was delivered by

MATHEW, J. In this case, the plaintiff, by his statement of claim, sought to recover from the defendant the sum of 684*l.* 14*s.* 5*d.* with interest, under the covenant of the defendant contained in a deed of the 6th of June, 1879. The defendant by his statement of defence, which has been amended by consent in the course of the argument, alleged that the deed of the 6th of June, was made between the plaintiff and the defendant, together with Wilson and Vowler, and was for the purpose, amongst other matters, of releasing the plaintiff from certain liabilities incurred by him on behalf of a partnership then existing between him and Vowler, under the name of the Canning Town Ironworks Company, the consideration for the release being that the plaintiff had agreed to retire from the business, leaving the same to be carried on by Vowler alone; and in another paragraph, that the defendant accordingly, with Wilson and Vowler, entered into a joint and

(1) Law Rep. 7 C. P. 372.
(2) 4 De G. J. & S. 756.
(3) 5 B. & Ald. 93.
(4) 4 Bing. N. C. 58.
(5) 5 C. P. D. 34.

several covenant to pay and discharge all the claims and liabilities of the plaintiff as mentioned in the statement of claim. Then, by way of set-off and counter-claim, the defendant said that before the commencement of the action the plaintiff was indebted to Wilson in the sum of 811*l.*, paid by him for the plaintiff at his request to the Royal Exchange Assurance Company, and that on the 8th of November, 1880, Wilson by deed, assigned the amount of this debt and interest to himself and the defendant in equal shares as tenants in common. In respect of one moiety of the plaintiff's claim the defendant alleged that his share of this 811*l.* was in excess of that moiety, and in respect of the other moiety that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and that Wilson's share of the 811*l.* and interest was in excess of this other moiety of the plaintiff's claim. The defendant claimed to set off these two moieties of the 811*l.* and interest against the two moieties of the plaintiff's claim.

It was argued for the defendant, with respect to the first moiety of the plaintiff's claim, that the defendant was entitled to set off a moiety of the sum of 811*l.* in respect of which it was alleged that the defendant and Wilson were entitled to be paid by the plaintiff. In other words, it was said, that if A. was entitled to be paid a sum of money by B., the latter could set off in equity his share of a debt, whether legal or equitable, which A. owed to him and another or others. It was not contended that any provision in the rules framed under the Judicature Acts applied to the case, but it was urged that it was reasonable and equitable to allow the set-off. It seems to us not to be either reasonable or equitable. For in such a case A. might reasonably say that when B. and the person or persons alleged to have a claim against him choose to sue him, he would be prepared with his defence, but that B. had no right to mix up the separate transactions between him and A. with other and independent transactions in which B. had only a joint interest.

Then as regards the other moiety, the defendant's contention is ingenious, but it seems to us hopeless. The defendant, admitting his liability to the plaintiff, alleges that if he paid the plaintiff he would be entitled to call on Wilson to contribute a moiety of the

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debt and that Wilson has a set-off in respect of that moiety against the plaintiff. But the defendant does not shew that he had any right to call on Wilson to appropriate the debt due to him from the plaintiff to the exoneration of the defendant, nor any contract with the plaintiff to accept a set-off of Wilson's debt as a discharge of the defendant. The attempt on the part of the defendant to establish a set-off of this extraordinary kind to the plaintiff's claim was explained by what was stated in the course of the argument, viz., that after the commencement of the action the defendant had obtained an order at chambers that Wilson should be added as a co-defendant. It would seem that, with a view of meeting the plaintiff's claim against both defendants, the assignment of the 8th of November, 1880, had been executed. The order to join Wilson as a defendant was subsequently set aside by the Court, and the pleadings in this action represent the effort of the defendant to avail himself of the assignment, as if Wilson were still a party to the action. It would seem that the defendant has sought to treat his joint and several covenant with the plaintiff as if it were joint only. This attempt must fail for the reason that the defendant's covenant is several as well as joint. We are of opinion that the demurrer to the statement of defence must be allowed.

Judgment for the plaintiff.

Solicitors for plaintiff: *Harper, Broad, & Battcock.*
Solicitor for defendant: *C. A. Curwood.*

Ex parte WHITCHURCH.

1881
March 5.
Q. B. D.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94, 96—*Notice to abate Nuisance—Order of Justices—Works necessary for the Purpose.*

A nuisance existed consisting of a privy and ashpit in such a state as to be a nuisance, and the local sanitary authority gave notice to the owner under the Public Health Act, 1875, s. 94, to abate the same, and for that purpose to fill up the ashpit, abandon the privy, and build a pail closet. The owner failed to do so, and justices thereupon, under s. 96, ordered the owner to fill up the ashpit, to abandon the privy, and to construct a proper and sufficient pail closet in lieu thereof. On a rule for a certiorari to quash the order of justices:—

Held, by Pollock, B., and Stephen, J., that the order was bad, as the justices had no power under s. 96 to order the erection of the pail closet.

Appeal dismissed for want of jurisdiction. 7 Q.B.D. 534.

THIS was an order calling upon two justices of the peace for the borough of Nottingham to shew cause why a writ of certiorari should not issue to bring up and to quash an order made by them on the 20th of August, 1880.

The facts were as follows:—Complaint was made before the justices by the inspector of nuisances for the urban sanitary district of the borough of Nottingham, that on certain premises within the urban sanitary district, whereof Charles James Whitchurch was the owner within the meaning of the Public Health Act, 1875, a nuisance existed, namely, a privy and ashpit in such a state as to be a nuisance, and that the nuisance was caused by the default of Whitchurch.

A summons was issued and came on for hearing in the ordinary way. The complainant's solicitor proved service of notice to Whitchurch that, under the provisions of the Public Health Act, 1875, the urban sanitary authority, being satisfied of the existence of a nuisance at Whitchurch's premises, namely, an offensive ashpit and privy, required him, within seven days from the service of the notice, to abate the same, and for that purpose to fill up the ashpit, abandon the privy, and build a pail closet.

The justices, on the evidence before them, being of opinion that a nuisance existed on the premises, and that the local authority had proved all that was necessary to be proved, made an order on Whitchurch "to fill up the said ashpit, to abandon the said privy, and to construct a proper and sufficient pail closet

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in lieu thereof, so that the same shall no longer be a nuisance as aforesaid."

A rule was obtained on behalf of Whitchurch, calling on the justices to shew cause why a certiorari should not issue to bring up and to quash this order. The ground on which the rule was granted was, that the justices had no power in directing the abatement of the nuisance to order the construction of a pail closet.

Philbrick, Q.C. (*R. J. Biron*, with him), shewed cause. The Public Health Act, 1875, authorizes not merely a direction by the local authority to abate a nuisance, but a direction to execute works. The notice under s. 94 in case of a nuisance existing, is to require the owner "to abate the same within the time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose," and the form given in sched. 4, form A, leaves a blank in the notice for the statement of "anything required to be done or works to be executed"—so by s. 96 the power of a court of summary jurisdiction to make an order dealing with the nuisance is to require the owner "to comply with all or any of the requisitions of the notice (of the local authority) or otherwise to abate the nuisance within a time specified in the order and to do any works necessary for that purpose." Sched. 4, form C, is the form of order for abatement or prohibition of a nuisance, and in it are to be specified any things required to be done or works to be executed, as for instance, "to construct a privy or drain." Here the local authority, and afterwards the justices, have required Whitchurch to execute the works which they think necessary to abate the nuisance. There is an appeal given to the court of quarter sessions, and this in itself is an argument that a discretion as to works rests with the justices. [He cited *Hargreaves* v. *Taylor*. (1)]

D. French, contrà. The sections from 90 onwards deal with nuisances and their abatement, and the works which may be directed relate to abatement and not to the building of something in lieu of the privy, which is a nuisance. If when the nuisance is abated there is any deficiency of construction, the local authority

(1) 3 B. & S. 613; 32 L. J. (M.C.) 111.

must fall back upon s. 36, which relates to the power of the local authority to enforce provision of privy accommodation for houses by ordering that a sufficient water closet, earth closet, or privy should be provided. [He was then stopped.]

POLLOCK, B. The 94th section, under which the notice was given, deals with the abatement of nuisances. No doubt there are cases where works are necessary for the abatement of a nuisance, for instance, to connect drains with the main sewer, or to get a sufficient water supply, but I can see no words in the 94th section to justify the contention that the owner of the premises can under it be required to put up a particular kind of closet. The duty of the justices is stated in s. 96, and there again the substantial matter dealt with is that the nuisance is to be abated, and the justices are to see that the notice to that effect is carried out. Sect. 35 and the following sections are enacted in a different spirit. They enable the local authority to require particular things to be erected, and the appeal against an order under those sections is to the central board, who have better capabilities of dealing with the propriety of such orders than the magistrates. The order, in my opinion, was wrong, and must be quashed.

STEPHEN, J., concurred.

Order quashed.

Solicitors for applicant: *Taylor, Hoare, & Taylor, for Hunt & Williams, Nottingham.*

Solicitors for justices: *Hughes & Co., for S. G. Johnson, Nottingham.*

1881
March 9.

Q. B. D.

ATTORNEY GENERAL *v.* MITCHELL AND ANOTHER.

Succession Duty—Appointment by Donee of General Power—Predecessor—Legacy Duty—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2. 18—36 *Geo.* 3, *c.* 52, *s.* 18.

In cases of appointments by donees of general powers which fall within s. 2, and do not fall within s. 4 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), the canon of construction adopted in *In re Barker* (7 H. & N. 109; 30 L. J. (Ex.) 404) and *Charlton* v. *Attorney General* (4 App. Cas. 427) is to be applied whether the power be joint or sole, and the appointees must be held to derive their interest from the donor of the power as "predecessor," and not from the donee.

Testator, in 1826, bequeathed personalty in trust for his daughter for life, and afterwards (in the event which happened) for such persons as she should by deed appoint, and in default of appointment for her next of kin. Testator died before the coming into operation of the Succession Duty Act, 1853, and legacy duty at 1 per cent. was paid upon the whole absolute interest of the trust fund. After that Act came into operation the daughter, by deed, appointed the trust fund to her sister's daughters:—

Held, by Grove and Lindley, JJ., that, as owing to the date of the testator's death s. 4 did not apply, the appointees derived their interest from their grandfather, the testator, as predecessor, within s. 2, and not from their aunt, the appointor, and that succession duty was therefore payable on their succession at the death of the appointor, at 1 and not at 3 per cent.

Held, also, that the payment of legacy duty under 36 Geo. 3, c. 52, s. 18, did not exempt the appointees from succession duty, since their succession did not come within the exemption granted by s. 18 of the Succession Duty Act, 1853, to persons already charged with legacy duty "in respect of the same acquisition of the same property."

INFORMATION. James Mitchell, by will, in 1826, after certain specific devises and bequests, devised and bequeathed all the residue of his real and personal estate to trustees, upon trust for sale and conversion, and as to the proceeds upon trust for his daughters equally for life, and afterwards amongst their children as they should by deed or will appoint respectively, and in default of appointment amongst their children equally; but if no child should attain a vested interest, in trust for such persons and in such manner as the testator's daughters should respectively by deed appoint, and in default of appointment for such persons as would have been entitled if the daughters respectively had died unmarried or intestate. The testator died in 1835, and his will was

proved, and legacy duty at 1 per cent. was paid upon the whole of his residuary personal estate, including the trust funds in question. One of his daughters married the Baron de Grothusen, and by a deed poll in 1859 exercised her general power of appointment, by appointing her share of the trust funds after the death of herself and her husband in favour of the daughters of her sister Ellen Jenison Walworth. Baron de Grothusen died in 1864 and the baroness in 1867, never having had children.

The Attorney General submitted—1, that as the baroness had under the testator's will a general power of appointment which she exercised, the property subject to the power became chargeable under the Legacy Duty Act (36 Geo. 3, c. 52), s. 18, with the same duty and in the same manner as if the property had been immediately given to the baroness, and that in fact legacy duty on this footing had been paid;—and 2, that the baroness having exercised the general power was the "predecessor" within s. 2 of the Succession Duty Act, 1853, from whom the interest of her nieces was derived under the disposition by the deed poll in 1859, and that Succession Duty at 3 per cent. was payable in respect of that succession.

The defendants (who were trustees of the fund for the nieces) contended that no succession duty was payable, or that if any was, it was only at 1 per cent., on the ground that the grandfather, James Mitchell, and not the aunt, the baroness, was the predecessor from whom the succession of the nieces was derived; and that since legacy duty had been paid no further duty was payable.

The information prayed a declaration that the baroness was the predecessor, and that succession duty at 3 per cent. was payable at her death in respect of the succession of her nieces with interest from her death. (1)

Sir F. Herschell, S.G., and *W. W. Karslake*, for the Crown.

(1) 36 Geo. 3, c. 52, s. 18. . . . Where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to any person or persons to whom the property would not belong in default of such appointment, such property upon the execution of such power shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons

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First. Succession duty at 3 per cent. is payable. For conveyancing purposes no doubt persons taking under an appointment from the

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having and executing such power, after allowing any duty before paid in respect thereof. . . .

Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession;" and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

Sect. 4. Where any person shall have a general power of appointment, under any disposition of property, taking effect upon the death of any person dying after the time appointed for the commencement of this Act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition, taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor.

Sect. 18. Where the whole succession or successions derived from the same predecessor and passing upon any death to any person or persons shall not amount in money or principal value to the sum of one hundred pounds, no duty shall be payable under this Act, in respect thereof or of any portion thereof; and no duty shall be payable under this Act upon any succession, which, as estimated according to the provisions of this Act, shall be of less value than twenty pounds in the whole, or upon any moneys applied to the payment of the duty on any succession according to any trust for that purpose, or by any person in respect of a succession, who, if the same were a legacy bequeathed to him by the predecessor, would be exempted from the payment of duty in respect thereof under the Legacy Duty Acts; and no person shall be charged with duty under this Act in respect of any interest surrendered by him or extinguished before the time appointed for the commencement of this Act; and no person charged with the duties on legacies and shares of personal estate under the Legacy Duty Acts, in respect of any property subject to such duties, shall be charged also with the duty granted by this Act in respect of the same acquisition of the same property.

donee of a power are considered to take from the donor of the power, but this technical rule does not apply to an appointment under a general power considered with reference only to succession duty, since a life interest, coupled with a general power of appointment, is equivalent to an absolute interest: the donee can appoint to himself. If the testator had died after the coming into operation of the Succession Duty Act, 1853, the case would have come under s. 4, and the baroness would have been the predecessor, as was held in *Attorney General* v. *Upton* (1), where the dictum of Martin, B., is no doubt against the present contention, but the dictum of Bramwell, B., is in its favour, and Pollock, C.B., is neutral. That case leaves the present undecided, but it is impossible to suppose that in construing s. 2 the donee of the power is the predecessor whenever the case falls within s. 4, and the donor whenever it does not. The present is one of the class of cases aimed at by s. 4; it is only the accident of the testator's death before 1853 which takes it out of that section. *In re Barker* (2) will no doubt be relied on by the defendants, but the Crown there gave up the point, which Bramwell, B., thought ought to have been decided in their favour. If that case ever was an authority, it cannot be so considered after *Attorney General* v. *Upton*. (1) In *In re Lovelace* (3) it was held that, where the power comes into operation (in that case by a settlement, in the present by a will proved) before the commencement of the Succession Duty Act, 1853, s. 4 does not apply; but that case would probably have been otherwise decided if it had come after instead of before *Wallace* v. *Attorney General*. (4)

Secondly. If succession duty is payable only at 1 per cent., then payment of the legacy duty does not exempt from succession duty, for, if the technical rule as to the donor of the power being the predecessor is to be applied at all, it must be applied throughout, and the succession of the nieces is a new succession different from the succession of the baroness, on which latter succession alone the legacy duty was paid, and is not "the same acquisition

(1) Law Rep. 1 Ex. 224.
(2) 7 H. & N. 109; 30 L. J. (Ex.) 404.
(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.
(4) Law Rep. 1 Ch. 1.

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of the same property" within s. 18 of the Succession Duty Act, 1853.

Hemming, Q.C., and *Hannen*, for the defendants. First. Succession duty at 1 per cent. only is payable, the predecessor within s. 2 of the Act being the donor and not the donee of the power. Whenever s. 4 does not apply, the predecessor is the person who creates the power, not the person who exercises it: *Lord Braybrooke* v. *Attorney General.* (1) It is admitted that the execution of the power must be read into the instrument creating the power so as to regulate the rights of the persons taking, and that there are cases within the Succession Duty Act in which this rule must be applied; then why not in all cases? The testator authorizes the donee of the power to write into the testator's will the names of the persons to be entitled as if the testator had originally written them there. The question is really decided by *Charlton* v. *Attorney General.* (2)

Secondly. Legacy duty has been paid upon the whole absolute interest in the corpus under 36 Geo. 3, c. 52, which by s. 18 enacts that where property is given for a limited interest, coupled with a general power of appointment, one duty shall be paid on the execution of the power as on an immediate legacy to the donee of the power, and that this shall be in satisfaction of all duties. Legacy duty has therefore been paid upon the interest taken by the nieces, for if it had not the Crown would have claimed it; and s. 18 of the Succession Duty Act, 1853, provides that such payment exempts from succession duty.

Sir F. Herschell, S.G., in reply. *Charlton* v. *Attorney General* (2) was a case of joint powers and not several, and is therefore not applicable. It was not within the class of s. 4 as the present case is. There, and in *Lord Braybrooke* v. *Attorney General* (1), all that the House of Lords decided was that the person who was the real settlor from whom the property is derived must be looked at and not the mere creatures of the power. There is no case in which it has been held that where an absolute disposition is made by the donee of a general power he is not the predecessor within s. 2 of the Succession Duty Act.

(1) 9 H. L. C. 150; 31 L. J. (Ex.) 177. (2) 4 App. Cas. 427.

7 Jun 1881

GROVE, J. It is admitted that s. 4 of the Succession Duty Act does not apply to the present case, because the testator died before the Act came into operation, and that the question turns entirely upon the effect of s. 2, and who is the predecessor within the meaning of that section. The question then is, what is the "disposition of property by reason whereof" the nieces of Baroness de Grothusen "became beneficially entitled to" the property which they enjoyed? I should have been inclined to think that the "disposition" was the deed-poll of July, 1859, by reason whereof the nieces "became beneficially entitled" upon the death of the baroness who executed the deed-poll; because I should have read the words of s. 2 in their ordinary and legal sense, not having been educated as a conveyancer. But I cannot set my personal opinion against the construction which has been put upon this section by the House of Lords. In *Charlton* v. *Attorney General* (1), a father tenant for life and his eldest son tenant in tail settled family estates, subject to life interests, to such uses (in the events which happened) as the father and the second son should appoint. The eldest son having died, the father and the second son appointed, and it was held by the House of Lords that s. 4 did not apply to a power given in a family settlement to a father and son, where one was intended to be a check upon the other in the exercise of the power; and that the case not being within s. 4, the "predecessor" within s. 2 was not the father and second son who exercised the general power of appointment, but the eldest son tenant in tail from whose estate of inheritance the interest given to the appointee was derived, and who was the real and original settlor. The Solicitor General contended that the present case is distinguishable from that, because there the power was given jointly to two persons who exercised it jointly, whereas in the present case the power was given to one person who thereby had an absolute dominion over the property. But I do not think that makes any distinction. Lord Chancellor Cairns says (2): "If this question is to be decided by the 2nd section of the Succession Duty Act, 1853, I do not think the answer to it can admit of any doubt either on principle or authority. The 2nd section, reading it shortly, enacts that every disposition of

(1) 4 App. Cas. 427.

(2) 4 App. Cas. at p. 437.

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property, by reason whereof any person shall become beneficially entitled to any property on the death of any person, shall be deemed to confer on the person entitled by reason of such disposition a succession, and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settlor or other person from whom the interest of the successor is derived. The appellants undoubtedly became beneficially entitled to property upon the death of St. John Charlton" (the father and tenant for life), "and they became so entitled by reason of a disposition of the property. What was the disposition of the property? I cannot doubt that it was that contained in the three deeds. . . . It was the first two of these which created the power in St. John" (the father) "and Thomas" (the second son), "and it was the third which exercised the power. Nor should I doubt that in this disposition William Charlton" (the eldest son and tenant in tail) "was the settlor. St. John Charlton had throughout nothing but an estate for life, and the first estate of inheritance was in William; and it was out of that estate of inheritance and out of the fee into which it was expanded that the interests given to the appellants came. . . . There is no doubt that the cases in this House, especially those of *Floyer* (1) and *Smythe* (2), did determine not only that the construction of the 2nd section was such as I have mentioned, but also that it was the 2nd and not the 4th section which governed such cases."

Lord Hatherley delivered judgment to the same effect, and said that the only question was whether it was a case within s. 4 or only within s. 2, and that upon the authorities it was clearly within s. 2 only. Lord Selborne's judgment is to the same effect, and I cannot read that case in any other way than as a decision that the case being within s. 2, and not within s. 4, the donor of the power and not the donee is the "predecessor."

In *In re Barker* (3) three out of four judges put a similar construction upon s. 2. Bramwell, B., indeed dissented, and I think there is much to be said in favour of his view, but the three judges took the other view. The Crown, therefore, in the present case is entitled to succession duty at 1 and not at 3 per cent.

(1) 9 H. L. C. 477.
(2) 9 H. L. C. 497.
(3) 7 H. & N. 109; 30 L. J. (Ex.) 404.

Upon the second question, I think the Crown is entitled to the 1 per cent. duty. Under the Legacy Duty Act, if duty was once paid on the whole absolute interest of the legacy, the person so paying is liable for nothing more. At the time the legacy duties were imposed no succession duty existed, but the Succession Duty Act imposed new duties; every person who takes a succession pays a succession duty. Then s. 18 of the Succession Duty Act exempts a person who has already paid legacy duty from paying succession duty "in respect of the same acquisition of the same property." If these nieces had paid legacy duty in respect of their interest, the Crown would not be entitled to succession duty, because the same person is not to pay twice, but the legacy duty was paid in respect of different persons. Therefore the Crown is entitled to succession duty at 1 per cent.

LINDLEY, J. I am of the same opinion. Sect. 2 of the Succession Duty Act, which imposes succession duties, is capable of two modes of construction. One is the popular construction, which would justify the contention of the Solicitor General, but that construction has never been applied to it. The other is (not an equitable construction, as it has been called), but a conveyancer's construction, by which the appointment under a power is incorporated into the instrument creating the power. This construction has been applied not only by the House of Lords in *Charlton* v. *Attorney General* (1)—a case of joint powers—but in the case of single powers in *In re Barker* (2) and *In re Lovelace.* (3) In the latter case there was no question as to different rates of duty, for the donor and the donee of the power were the same person, but the judgment of Turner, L.J. (4), shews that he was prepared to put the conveyancer's construction on s. 2. In that case Wood, V.C., had decided that since general powers were dealt with by s. 4, s. 2 did not apply to them, but that decision was corrected by the Lords Justices. In *In re Barker* (2) the same construction was placed on s. 2, Bramwell, B., alone dissenting. There is no case in which it has been held that where s. 4 does not

(1) 4 App. Cas. 427.
(2) 7 H. & N. 109; 30 L. J. (Ex.) 404.
(3) 4 De G. & J. 340; 28 L. J. (Ch.) 489.
(4) 4 De G. & J. at p. 348; 28 L. J. (Ch.) at p. 495.

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apply the other and popular canon of construction is to be adopted in reading s. 2. Therefore taking these decisions as a guide, it follows, that though in the present case the power is sole, yet since s. 4 does not apply in consequence of the testator's death before the commencement of the Succession Duty Act, the appointees derive their interest from the original settlor, the donor of the power, and not from the donee, the appointor.

Attorney General v. *Upton* (1) was a case where s. 4 applied, and the Court held that s. 4 makes the donee of a general power who exercises it owner for a certain purpose, and makes the appointees claim through him, but we have nothing to do with that decision here. I think, therefore, that on this point the Crown is wrong, and is only entitled to 1 per cent.

As to the second point, there is a fallacy in saying that legacy duty having been paid by the donee of the power no succession duty is chargeable, because the donee could do with the property as she liked. Mr. Hemming argued that this is imposing two duties on "the same acquisition of the same property," but that depends on what is done with the property. Here there are two dispositions, and therefore two duties are payable.

Decree for succession duty at 1 *per cent.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Young, Jackson, & Beard.*

(1) Law Rep. 1 Ex. 224.

THE YORKSHIRE FIRE AND LIFE INSURANCE COMPANY, APPELLANTS; CLAYTON, RESPONDENT.

1881
March 10.

Q. B. D.

Inland Revenue — Inhabited House Duty — Dwelling-house let in different Tenements — Occupation of part by Landlord — 41 Vict. c. 15, s. 13.

By 41 Vict. c. 15, s. 13, where any house being one property is divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood, or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt although a servant or other person may dwell in such house or tenement for the protection thereof.

A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder and the rooms on the first floor were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided, and the remainder by a caretaker and his wife, who acted as servants to the residents, and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—

Held, by Grove and Lindley, JJ., that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house.

Per Grove J., that there was a common use of the house by the landlords and the residents and other tenants for residential purposes which excluded the exemption.

Per Lindley, J., that since the landlords occupied part of the house, otherwise than as caretakers, the house was not divided into and let in different tenements within the statute.

SPECIAL CASE stated under 37 Vict. c. 16, on an appeal from an assessment of certain premises of the appellants to inhabited house duty. The following are the material facts:—

The premises in respect to which the assessment was made had been recently erected by the appellants, and were occupied as follows: The ground floor partly as offices by the appellants, and the remainder as offices by a bank and a civil engineer; the first floor was entirely occupied by tenants as offices for business purposes; the second floor consisted of rooms some of which were occupied as residences by the curates of St. Mary's Church, Hull, and the remainder by a caretaker and his wife, who, in addition

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to acting as the domestic servants of the clergymen, cleaned the several portions used by the appellants, and let off by them as offices.

The building was to all intents and purposes one house, with an entrance to the street, and the offices and rooms opened into a hall, passages, and staircase, which were common to all the tenants. The offices occupied by the appellants, the bank, and the other tenants, were separately rated to the poor, as was also the top floor, under the description "rooms." The whole rate was charged in one sum, and paid by the company, but each tenant repaid to the company the proportion due in respect of his occupation.

The appellants claimed relief from the amount of duty charged in the assessment, so as to confine the same to the portions of the premises not used as offices.

Bigham, for the appellants. The question is, whether this house is divided into, and let in, different tenements so as to exempt, under the Customs and Inland Revenue Act, 1878, s. 13 (1), any of such tenements as are occupied solely for the purposes of a trade or profession. This Act was intended to enlarge the previous exemptions which before the Act would no doubt not have

(1) 41 Vict. c. 15, s. 13, enacts: "(1.), where any house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the Acts relating to the inhabited house duties, shall upon proof of the facts to their satisfaction grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid or are unoccupied.

"(2.) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit shall be exempted from the duties by the said commissioners on proof of the facts to their satisfaction, and this exemption shall take effect, although a servant or other person may dwell in such house or tenement for the protection thereof."

included this case: *Rusby* v. *Newson*. (1) The different occupations in this house are "different tenements," and in respect of such as are not occupied for residential purposes, no inhabited house duty can be charged, and the residence of a caretaker on the premises does not affect the exemption.

Sir F. Herschell, S.G. (*Dicey*, with him), for the respondent. The test of what is a "different tenement" is supplied by the case of *Attorney General* v. *Mutual Tontine Westminster Chambers Association* (2), where each suite of rooms or set of chambers was practically a separate property. These offices are merely parts of a house, and not separate and distinct chambers. Further, the whole house must be let in tenements, but here the landlord occupies part, and that can in no sense be said to be let.

Bigham, in reply. If the house be divided into separate tenements, so as to be capable of being entirely let off, the fact that the landlord occupies for trade purposes one of such tenements cannot affect the exemption, otherwise the object of the Act to limit the tax to premises actually inhabited would be defeated.

GROVE, J. I do not say the section is free from difficulty, but upon the whole I think our judgment ought to be for the Crown. As far as I can judge, this section was intended to apply to a house which was let in separate and distinct parts, somewhat as chambers are let, so that the parts let are really perfectly separate tenements inhabited by different occupiers, who have absolute and exclusive control over each separate part, though having a common staircase. In that case the taxation is not to fall on those parts of the house let, "those different tenements" (these are the words of the Act) let for trade purposes. It is true that certain people had certain rooms in this house for the purposes of trade; but I do not think the house is let in different tenements. I agree with Mr. Bigham in this, that I do not think we should go the length of saying that the whole house must be let, in the sense that the landlord might not inhabit a part of it, but the house must be substantially divided and let into different tenements so as to constitute independent tenements. Here one whole floor is inhabited by persons who use it as a residential house,

(1) Law Rep. 10 Ex. 322. (2) Law Rep. 10 Ex. 305.

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each of the rooms they inhabit, with one exception, opening by separate doors upon the staircase. (1) Two servants attend upon them, and also act for the occupiers of the other rooms. They are not mere caretakers or watchers. They are not persons kept to watch a house at night, but they are daily occupied in the duties of ordinary servants, therefore it appears to me that in one sense the whole of the house is to some extent residentially occupied. I cannot therefore say that this house is within the fair meaning of these words, "let in different tenements;" because there is nothing to shew that each of those tenements is held as a different and separate holding, of which the persons have entire and absolute control by themselves and their servants, irrespective of the whole of the remainder of the house. The words of the section when analysed are extremely difficult, and it is very difficult to give a consistent meaning to the whole of them. I do not pretend to do so; but I do not think the tenements are occupied here solely and exclusively for purposes of trade. I rely upon the finding of the case relative to the servants, although it is a small point no doubt. I think the case shews a common use of the house by the landlord, the curates, and the other persons occupying the house to that extent for residential purposes. I think, therefore, our judgment must be for the Crown.

LINDLEY, J. I am of the same opinion. It is for the appellants to bring themselves within this exemption, and I do not think they have done so. I do not think the clause applies to a case where a landlord occupies any part of the house, not as a caretaker, which might bring the case within the 2nd sub-s., but for the purposes of residence or business. The difficulty about the word "let" is obvious, but we must read the section in such a way as to give it a sensible effect. It contemplates the house being divided into tenements, some of which are let for business purposes or are unoccupied. They may be let, and some of the lessees may not have taken possession; but what I think is meant is this, that if the house is let, that is to say, intended to be let, habitually let, sub-s. 2 would apply, but not to the case of a house not intended to be let in its entirety, and in which some

(1) This appeared by a plan attached to the case.

of the property is occupied by the landlord. To secure the exemption within the words of the statute, the whole should be let for the purposes of trade, and the landlord only occupy as a caretaker. Then, I confess, I doubt whether these are different tenements within the meaning of the section. It is difficult to say what a "different tenement" is, but my impression, which I get from the discussion in *Attorney General* v. *Mutual Tontine Westminster Chambers Association* (1), is, that the expression indicates a tenement complete in itself, not mere rooms opening on to a common staircase. The tenements there were tenements which were complete in every sense, that is to say, they were suites of apartments, they were flats, they were houses on one floor instead of houses of several floors. I do not think this house was divided into, and let in, different tenements within the meaning of that section.

Judgment for the Crown.

Solicitors for appellants: *Bell, Brodrick, & Gray, for W. & E. Gray, York.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

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March 23.

Q. B. D.

Fire Insurance—Loss occasioned by the felonious Act of the Wife of the Assured—Rights of the Insurer—Risks covered by Policy—Felony—Action maintainable without showing that Felon prosecuted.

An insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—

Held, First, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony if it were maintainable was maintainable without shewing that the felon had been prosecuted.

Semble, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy.

STATEMENT OF CLAIM was in substance as follows:—

It stated that the plaintiffs, by a policy of insurance, agreed

(1) Law Rep. 10 Ex. 305.

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with the defendant, Charles Smith, that if certain property therein described, or any part thereof, should be destroyed or damaged by fire at any time between the 21st of June, 1880, and the 24th of June, 1881, the plaintiffs would make good such loss or damage to an amount not exceeding 200*l.*; that on the 25th of October, 1880, the defendant, Mary Smith, knowing the premises, and being by the direction and with the consent of the defendant, Charles Smith, in sole charge and control of the dwelling house in which the goods insured were, and of the goods so insured, and maliciously purposing and intending to burn and damage by fire such property insured, and to injure the said company, and to create a claim on the said policy against the said company, wilfully lit, or caused to be lit, fires in the said dwelling house, and thereby caused such property insured to be, and the same was, damaged and in part destroyed by the said fires; that the defendant, Charles Smith, had made a claim upon the plaintiffs, which claim arose from the said acts of the defendant, Mary Smith, and that by means of the premises the plaintiffs had incurred trouble and expense in investigating the said claim, and had become liable thereto, if any such liability existed.

The plaintiffs claimed 150*l.*, and to have the said policy given up by the defendant, Charles Smith, to be cancelled.

Demurrer.

March 22. *Dodd*, for the defendants.

Waddy, Q.C., and *Jackson*, for the plaintiffs.

The arguments and authorities cited appear from the judgment.

March 23. WATKIN WILLIAMS, J. This action is one of an extraordinary, and so far as I am aware, of an unprecedented character. The questions of law involved in the case, which was argued before me yesterday, arise upon demurrer to the statement of claim, and I now proceed to give judgment.

The facts, which for the purposes of the argument are assumed to be true, are as follows:—The plaintiffs, an insurance company, granted to the defendant, Charles Smith, a policy of fire insurance, dated the 26th of June, 1880, by which they agreed with him that if certain property in a certain house should be

destroyed or damaged by fire they would pay or make good all such loss or damage during the currency of the policy. The defendant Mary, the wife of the defendant Charles Smith, having been left by him in charge of the house and property insured did, with the malicious intention of destroying the insured property and of injuring the insurance company and of creating a claim upon the policy, wilfully set fire to and destroy the house and the insured property. Charles Smith, the assured, then made a claim upon the policy against the company. The company thereupon brought this present action against Smith and his wife, to recover damages for the loss which the company alleged they had sustained or might sustain through the wrongful and felonious act of the defendant Mary, if the defendant Charles made good his claim upon his policy.

I was informed in the course of the argument, although these facts do not appear formally before me, that the defendant Charles had, before this present action, brought an action against the company upon the policy to recover the amount of his loss, and that in that action the company disputed their liability on the ground that the loss, having been caused by the arson of the wife, was not covered by the policy, and that they had also set up a counter-claim for damages against Smith and his wife, who was brought in as a party to the action upon the same ground; that that action went down to trial, and that the learned judge, before whom the cause came on for trial, adjourned the proceedings in order to enable the company to test the validity in law of their contention in a separate and distinct manner before proceeding to try the question of arson. The present action was then commenced. The questions, however, for determination in this action must depend exclusively upon the facts set forth in the statement of claim, and the issues of law raised by the demurrer.

The company in support of their case started with the general principle that "every husband is liable for the wrongful acts of his wife," and that as the defendant Mary had wrongfully injured and destroyed the insured property, and had caused the damage upon which a claim upon the policy had been based, they, as the insurers of the property, had a right to sue her and her husband for the damage and injury so done by her, and not the less so

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because the husband happened to be himself the assured whom they had agreed to indemnify. In substance, the contention of the company came to this, that they ought not to be called upon to pay to the assured the amount claimed, without being entitled concurrently to claim damages from him for the loss caused by the act of his wife, for which he is answerable.

The defendants, by their demurrer to this claim, raised two main issues of law. In the first place they said that the company were not in a position to maintain any action for the alleged damage done to the goods, because they were not the owners of the goods, nor had they sufficient interest therein to entitle them to maintain an action; that their only right as insurers would be to avail themselves of such rights and remedies as were vested in their assured, after they had admitted his claim and been subrogated to his rights in relation to the subject of insurance; and that, even if they had been subrogated to the rights of the assured, they could only sue in his name and could not maintain an action in their own name, and therefore that no such action could be maintained in the present case, because the assured had no right of action against his own wife.

In the next place the defendants contended that this action being based upon an act, which on the face of the statement of claim amounted to a felony, could not be maintained, because it was not shewn that the rights of the public law had been vindicated by a prosecution of the felon.

Upon the first ground of demurrer the defendants are, in my judgment, clearly entitled to judgment both upon principle and upon authority. It appears to me that the insurance company have no right of action under the circumstances for the damage done to the goods by the defendant Mary. At the time when the damage was done to the goods the company had no property or interest in the goods sufficient to sustain any action for damage done to them; no right or interest in the goods could accrue to the insurance company, until they had acknowledged the claim under the policy, and by so doing entitled themselves to the benefit of any claims and causes of action vested in the assured; but it seems that even up to this moment the insurance company dispute the claim and deny the right of the assured to demand

an indemnity under the policy. But, further, it seems to me equally clear that, if they had done everything to entitle themselves to the benefit of such a claim, it could only be enforced in the name of the assured and for the purpose of enforcing his rights, and inasmuch as he could have no such claim or right against his wife, it follows that in no possible view of the case is the plaintiffs' claim sustainable. The case of *Simpson* v. *Burrell* (1) is in point upon this question. In that case Burrell was the owner of two ships, one of which negligently ran down and sank the other with a valuable cargo. Burrell's underwriters upon the sunken ship paid him for a total loss, and were so subrogated to all his rights. A claim was made by the owners of the cargo in the sunken ship against Burrell, as the owner of the ship in fault, for the value of their goods, and Burrell, as the owner of the ship in fault, paid into court the whole value of that ship at 8*l.* per ton, as the limit of his liability under the Merchant Shipping Acts, to be rateably divided among all who had sustained loss and damage by the ship being negligently run down and sunk; thereupon Burrell's underwriters upon the sunken ship who had paid for a total loss claimed to come in and share with the rest the money paid in by the ship in fault; but the House of Lords, reversing the decision of the Lords of Session in Scotland, decided that they had no such right, and the reasoning in that case is directly applicable to the present. The Lord Chancellor Cairns, said, "The view of the Lord President therefore appears to be that, after payment by the underwriters as on a total loss, there is effected by some independent operation of law a transfer of whatever, if anything, can be recovered in specie of the thing insured—and by reason of the transfer of the thing insured an independent right in the underwriters to maintain in their own name, and without reference to the person assured, an action for the damage to the thing insured which was the cause of the loss. I am not aware of any authority for the view of the case thus taken. I know of no foundation for the right of the underwriters, except the well known principle of law that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the

(1) 3 App. Cas. 279.

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person indemnified might have protected himself against or reimbursed himself for the loss."

Lord Penzance said: "The learned counsel for the underwriters contended that they, by virtue of the policy which they entered into in respect of this ship, had an interest of their own in her welfare and protection, inasmuch as any injury or loss sustained by her would indirectly fall upon them as a consequence of their contract, and that this interest was such as would support an action by them in their own names and behalf against a wrongdoer. This proposition virtually affirms a principle which I think your Lordships will do well to consider with some care, as it will be found to have a much wider application and signification than any which may be involved in the incidents of a contract of insurance. The principle involved seems to me to be this—that where damage is done by a wrongdoer to a chattel, not only the owner of the chattel, but all those, who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer, although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation. This, I say, is the principle involved in the respondent's contention. If it be a sonnd one, it would seem to follow that, if by the negligence of a wrongdoer goods are destroyed, which the owner of them had bound himself by contract to supply to a third person, this person, as well as the owner, has a right of action for any loss inflicted upon him by their destruction. But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of the attendance and medicine cast upon him by the accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer, bound for a term to a manager of a theatre, is disabled by

the wrongful act of a third person to the serious loss of the manager; can the manager recover damages for that loss from the wrongdoer? Such instances might be indefinitely multiplied, giving rise to rights of action which in modern communities, where every complexity of mutual relations is daily created by contract, might be both numerous and novel." See, also, the cases of *Randal* v. *Cockran* (1); *North of England Insurance Association* v. *Armstrong* (2); *Stewart* v. *Greenock Marine Insurance Co.* (3); *Davidson* v. *Case* (4); *Mason* v. *Sainsbury* (5); *Yates* v. *Whyte.* (6)

This action cannot therefore in my judgment be maintained, nor is there any substantial injustice in such a result, because, as it seems to me, the insurance company are in this dilemma; the loss and damage caused by the wrongful act of the wife either is or is not a loss which the company have agreed to indemnify the husband against; now, if it is such a loss, an attempt by the company to enforce against the husband a return indemnity or reimbursement is at variance with the very substance of their undertaking to indemnify him; if, on the other hand, the loss, by reason of its having arisen from the act of the wife, is not within the risks and losses covered by the policy, then this action is as wholly misconceived, unnecessary, and unfounded, as if the loss had been caused by any other risk not covered by the policy. The truth is that the real and substantial contention on the part of the insurance company is, that the loss in question having been caused by the wilful act of the wife of the assured, although acting without the privity of her husband, is not a loss covered or insured against by the policy. That question might be raised in the action brought by the assured against the company upon the policy, but it does not arise, and indeed could not be raised, so as to receive a binding and judicial determination, in such an action as the present. As however the question has been fully and ably argued before me, and as the parties have expressed a desire to elicit an opinion upon the point, I have no hesitation in saying that it appears to me to be upon principle perfectly clear and free from doubt that such a loss would be covered by an ordinary policy

(1) 1 Ves. Sen. 97.
(2) Law Rep. 5 Q. B. 244.
(3) 2 H. L. C. 159.
(4) 8 Price, 542.
(5) 3 Douglas, 61.
(6) 4 Bing. N. C. 272.

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against loss caused by fire; under such a policy the company would be liable for every loss caused by fire, unless the fire itself were caused and procured by the wilful act of the assured himself or some one acting with his privity and consent. In order to escape from responsibility for such a loss as the present the company ought to introduce into their policy an express exception.

The second point raised by the demurrer, namely, that an action cannot be maintained to recover damages for a wrongful act amounting to a felony, unless the public right has been first vindicated by a prosecution of the felon, has in the present view of the case ceased to be material, but as the case may go to the Court of Appeal I think it better not to pass the point over wholly unnoticed.

The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one; and I shall now shortly refer to the authorities upon each view. In support of the first view is the declaration of the judges in the case of *Higgins* v. *Butcher* (1) in the year 1606. The action was brought by the plaintiff against the defendant for damages for assaulting and beating his wife to death. In the report in Yelverton it is stated that Tanfield, J., with the concurrence of Fenner and Yelverton, said, in giving judgment for the defendant, that "if a man beat the servant of J. S. so that he dies, the master shall not have an action against the other for

(1) Yelv. 89.

the battery and loss of service, because the servant dying of the extremity of the battery it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before and his action is thereby lost." The report in Noy. (1) says, "By the Court that action will not lie, for the king only is to punish felony except the party brings an appeal." The point, however, was not strictly necessary for the decision of the case, because the action was personal only to the wife and abated with her death.

In *Markham* v. *Cobbe* (2) Sir William Jones, in 1626, held that "after conviction" upon an indictment "for felony, the action did not lie because it is found to be felony by the verdict and inquest, and the party shall not be admitted now to make that trespass," but Doderidge and Whitelock were in favour of the plaintiff, because the plea did not aver that the plaintiff had given evidence upon the prosecution, so as thereby to have entitled himself to restitution upon conviction, under the statute 21 Hen. 8.

In support of the second view there are a vast number of dicta of judges of the highest authority, but little or nothing of decisive authority. In *Dawkes* v. *Coveneigh* (3), in 1652, which was an action for damages after the conviction of the defendant for breaking the house of Dawkes and taking 250*l.*, Chief Justice Roll, denying that the trespass was drowned in the felony, said, "This is after conviction, and so is here no fear that the felon shall not be tryed; but if it were before conviction the action would not lye for the danger the felon might not be tried, and there is no inconvenience if the action do lye."

Sir Mathew Hale's treatise upon the pleas of the Crown (4), published after his death in 1681, in treating of the three means of restitution of goods stolen, viz., 1, By appeal of robbery; 2, By statute 21 Hen. 8, c. 11; and 3, By course of common law, says of the last that after conviction trover lies, but that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings trover, it lies not, for so felonies should be

(1) Noy. 18.
(2) Sir W. Jones, 147; Noy. 82.
(3) Sty. 346.
(4) 1 Hale, P. C. 546.

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healed, and for this he cites *Dawkes* v. *Coveneigh* (1) and *Markham v. Cobbe* (2) above referred to.

The case of *Hudson* v. *Lee* (3) in 1589, seems to be a still earlier example of an action having been maintained for a felony. In *Crosby* v. *Leng* (4), decided in 1810, the plaintiff brought his action for that which proved to be a felonious assault, for which the defendant had been previously indicted, tried, and acquitted; there was a verdict for the plaintiff, subject to the opinion of the Court upon the question whether, after an acquittal, an action lay, and Lord Ellenborough, in giving judgment in the plaintiff's favour, said, "The policy of the law requires that before the party injured by any felonious act can seek civil redress for it, the matter should be heard and disposed of before the proper criminal tribunal, in order that the justice of the country may be first satisfied in respect to the public offence—if the acquittal be shewn either in pleading or by evidence to have been obtained by collusion it would be put aside, and the objection would still remain." The defendant, however, could not have set up his own felony by way of plea in bar, as was decided in *Lutterell* v. *Reynell.* (5) It may not be immaterial to notice that in the year 1819, by statute 59 Geo. 3, c. 46, the writ of appeal of felony, which was the ancient process by which the private suitor sought redress for his individual injury, was abolished on account of the oppressive nature of the proceedings under it. In the case of *Gimson* v. *Woodfull* (6), which was an action of trover for a mare stolen from the plaintiff by one from whom the defendant bought her, Chief Justice Best nonsuited the plaintiff, saying, "I am of opinion that the plaintiff has done nothing that he ought to have done. I take the law to be this,—you must do your duty to the public before you seek a benefit to yourself, and then there is no necessity for a civil action." This case, which was decided in the year 1825, is an express decision in point, but it was, as a decision, overruled in *White* v. *Spettigue.* (7) In 1827 the question was discussed in the Court of King's Bench in the case of *Stone* v. *Marsh* (8), which was an issue out of Chancery directed to try

(1) Sty. 346.
(2) Noy. 82.
(3) Rep. 43a.
(4) 12 East, 409.
(5) 1 Mod. 282.
(6) 2 C. & P. 41.
(7) 13 M. & W. 603.
(8) 6 B. & C. 551.

the right of the plaintiffs, the proprietors of some bank stock, against the defendants, who had innocently received the proceeds through a power of attorney forged by Fauntleroy for the the transfer of the stock. Lord Tenderden, in giving judgment in the plaintiff's favour, said, "Can the House set up this felony as an answer to the plaintiff's claim? In general a man cannot defend against a demand by shewing on his part that it arose out of his own misconduct, according to the maxim, 'Nemo allegans suam turpitudinem est audiendus.' There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action, not that he shall not maintain a civil action to recover from a third and innocent person that which has been feloniously taken from him, but that he shall not sue the felon, and it may be admitted that he shall not sue others together with the felon in a proceeding to which the felon is a necessary party, and wherein his claim appears by his own shewing to be founded on the felony of the defendant. The rule is founded in public policy," which "requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender by receiving back stolen property or any equivalent or composition for a felony without suit, and of course cannot be allowed to maintain a suit for such a purpose."

In 1845 the case of *White* v. *Spettigue* (1) was tried before Lord Cranworth. This was an action of trover brought by a solicitor against a bookseller, who had innocently purchased, and afterwards sold, certain books which had been stolen from the plaintiff. The learned judge told the jury that there was no evidence to shew who stole the books, and the property in the goods, being originally in the plaintiff, could not be taken out of him by any act of a third party, and he directed them to find for the plaintiff, unless they believed the defendant received them knowing them to have been stolen, in which case the right would then merge in the felony, and the plaintiff would not be entitled to recover. The jury having found for the plaintiff, the defendant moved for a new trial on the ground of misdirection, citing *Gimson* v. *Woodfull* (2) as directly in point; and Lord Cranworth, in expressing his

(1) 13 M. & W. 603. (2) 2 C. & P. 41.

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dissent from the ruling in *Gimson* v. *Woodfull* (1) as being too general, said: "I think the true principle is, that where a criminal, and consequently an injurious, act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for the civil injury to the prejudice of public justice, and to waive the felony and go for the conversion." It was also considered that under the pleas, which were not guilty and not possessed, the point was not open to the defendant, and Lord Cranworth concluded by saying, "With respect to what I said at the trial, that if the defendant had been the guilty receiver of the books he would be entitled to the verdict, I must retract that and suspend my judgment on that point, as I entertain some doubt whether I was correct." This case, although it overrules *Gimson* v. *Woodfull* (1) as a decision, leaves the point under discussion undetermined.

The next reported decision seems to be *Wellock* v. *Constantine* (2) in 1863. That was an action by the plaintiff, a young woman, "for that the defendant assaulted and forcibly violated her person and debauched her, whereby she became pregnant." The case came on for trial before Willes, J., when, after the plaintiff's evidence proving the forcible connection, it was objected for the defendant that the action was not maintainable, and the learned judge so ruled, stating "if a rape was proved, that could not form the subject of a civil action, but the plaintiff must proceed criminally, and if the connection took place with the consent of the plaintiff no action would lie." A rule nisi for a new trial having been obtained was afterwards discharged, Pollock, C.B., saying, "The ground upon which the nonsuit proceeded was, that after it appeared that the civil wrong complained of, and for which a civil remedy was sought by action, involved a charge for felony, the proper course was not to proceed with the trial, but to prosecute for the criminal offence." Bramwell, B., concurred, but Martin, B., dissented from their decision. This is a very strong and decisive decision, because, bearing in mind that the declaration stated on the face of it that the injury complained of amounted to a felony, and the only plea was not guilty, even the doctrine of merger would scarcely seem to justify a judge at nisi prius in nonsuiting

(1) 2 C. & P. 41. (2) 2 H. & C. 146; 32 L. J. (C.P.) 285.

a plaintiff upon the mere issue of not guilty; but the nonsuit was upheld and the decision was affirmed.

The question arose again in a very similar form in the case of *Wells* v. *Abrahams* in 1872. (1) This was an action of trover for a brooch; pleas, not guilty and not possessed; at the trial before Lush, J., the evidence shewed a felonious taking; after a verdict for the plaintiff, the defendant having obtained a rule nisi for a new trial upon the ground that the act complained of proved to be a felony, and therefore that the action would not lie, this rule was discharged upon the ground that the judge, as a mere commissioner of nisi prius, could only try the issues joined, and had no power to direct a verdict for the defendant against positive and affirmative evidence in favour of the plaintiff. Cockburn, C.J., said: "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted. But although this is the rule, it becomes a different question when we have to consider how it is to be enforced. It may be that if a person neglecting his duty to prosecute for an offence committed against him were to bring an action instead of prosecuting, the Court might be called upon to intervene and to prevent the plaintiff obtaining by judgment and execution the fruits of the action thus improperly brought." Lord Blackburn was of the same opinion, and said: "While the law throws the prosecution of criminal offences on private individuals, it may be in some cases that the civil remedy is suspended until there has been a prosecution for the felony. If an action were brought against a defendant, and it was stated by the Attorney General, on behalf of the Crown, that criminal proceedings were pending, and the action was brought with an intention of compromising the felony, the Court might, in the exercise of its summary jurisdiction, stay proceedings in the action until the indictment for felony had been tried." His Lordship, after reviewing the authorities, expressed his disapproval of the nonsuit in *Wellock* v. *Constantine* (2), and stated that that case could not be treated as an authority.

(1) Law Rep. 7 Q. B. 554. (2) 2 H. & C. 146.

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Lush, J., assented, upon the ground that the judge at nisi prius could only try the issues joined, and that it was not competent to him to interpose and stop the case in manner suggested; that if the declaration disclosed that which made it bad on demurrer or in arrest of judgment, that would not justify the judge at the trial in stopping the case. This case, although it actually decided no more than that a judge of nisi prius had no power to do more than decide the issues joined upon the record, tended strongly in the direction of proving that practically a civil action for damages might be maintained for a wrongful act amounting to a felony. The defendant could not plead his felony, the judge could only try the issues raised upon the pleadings, and there is no instance on record of the Attorney General or the Crown having interposed to stop the action. This position of the question is somewhat altered by the Judicature Act. The judge of nisi prius is no longer a mere commissioner to try issues; but by that Act (36 & 37 Vict. c. 66, s. 29) every judge acting under the ordinary commissions constitutes a Court of the High Court of Justice. In this uncertain state of the law the question was once more discussed in the case of *Ex parte Ball, In re Shepherd* (1) in 1879, when the doctrine that it was a condition precedent to the enforcing the civil remedy that the felon should have been first prosecuted, if it ever had any solid foundation, was finally exploded. The question arose in the bankruptcy of one Shepherd, who had been a clerk in the banking house of Willis & Co., and had embezzled about 7000*l.* of their moneys. Willis & Co. had neglected to prosecute and had given the felon an opportunity for escape. Shepherd was made a bankrupt, and shortly afterwards Willis & Co. became bankrupt, and Ball having been appointed their trustee, brought in a proof upon Shepherd's bankruptcy for the 7000*l.*, and the question was whether it could be allowed on account of the felony. The Lords Justices held that the trustee in bankruptcy, against whom no charge of neglect to prosecute could be brought, was entitled to prove for the debt. Bramwell, L.J., said: "The law upon this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt,

(1) 10 Ch. D. 667.

except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that of Blackburn, J., in *Wells* v. *Abrahams*" (1); and he points out that there are "only four possible ways in which the impediment can arise: 1. That no cause of action arises at all out of a felony. 2. That it does not arise till prosecution. 3. That it arises on the act, but is suspended till prosecution. 4. That there is neither defence to, nor suspension of, the claim by or at the instance of the felon debtor, but that the Court, on its own motion, or at the instance of the Crown, may stay proceedings till public justice is satisfied." But he points out difficulties in the way of each theory, and finally suggests that there is a great deal to justify Mr. Justice Blackburn's doubt. Baggallay, L.J., agreed with the result, and laid down the following propositions as resulting from the authorities: "1. That a felonious act may give rise to a maintainable action. 2. That the cause of action arises upon the commission of the offence. 3. That notwithstanding the existence of the cause of action, the policy of the law will not allow the person injured to seek civil redress, if he has failed in his duty of bringing or endeavouring to bring the felon to justice. 4. That this rule has no application to cases in which the offender has been brought to justice at the instance of some other person, or in which prosecution is impossible by reason of the death or escape of the felon. 5. That the remedy by proof in bankruptcy is subject to the same principles of public policy as those which affect an action." The resolutions laid down by Baggallay, L.J., appear to me to be sound and logical, and to be fully supported by the authorities when closely examined.

The question in the present case arises upon demurrer to the statement of claim, by which all that appears is that the plaintiffs are suing for damages for an injury caused by the felonious act of the defendant Mary; the only question, therefore, is, whether such an action is primâ facie maintainable, or whether upon the face of the claim it ought to be finally and conclusively rejected. In my judgment, upon this demurrer, the action may be maintainable in fact. There is nothing to shew whether the plaintiffs have or have not neglected to prosecute the felon; and it is consistent with this

(1) Law Rep. 7 Q. B. 554.

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demurrer that the felon may in fact have been convicted; and, as it seems clear to me that the prosecution of the felon is not an absolute condition precedent to the accruing of the cause of action, the statement of claim is primâ facie sufficient, so far as the present point is concerned. But as in my opinion the action is upon the first ground not sustainable, the judgment upon this demurrer must be for the defendants.

Judgment for the defendants.

Solicitors for plaintiffs: *Swann & Co., for Tweed, Stephen, & Dashper.*

Solicitor for defendants: *John Cotton.*

March 25.

Q. B. D.

THE GUARDIANS OF THE PLOMESGATE UNION, APPELLANTS; THE GUARDIANS OF THE WEST HAM UNION, RESPONDENTS.

Poor Law—Parish—Union—Settlement—The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *ss.* 34, 44.

5 QBD 101
102-3

"Parish" in s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), does not include "union."

A pauper resided for more than three years in a union, residing continuously for more than two and less than three years of the period in one parish of the union and for more than one and less than two years of the period in another parish of the same union, in such manner and under such circumstances, as would in accordance with the several statutes in that behalf, render her irremovable:—

Held, by Lindley and Mathew, JJ., that such a residence did not constitute a settlement within s. 34 of 39 & 40 Vict. c. 61.

CASE stated by the Essex Sessions upon an appeal against an order of removal, adjudging the last legal settlement of Elizabeth Newson to be in the parish of Framlingham, in the appellant union, and ordering her removal from the respondent union to the appellant union. The sessions confirmed the order subject to the following case:—

Elizabeth Newson (now thirty years old), was born illegitimate in the parish of Framlingham. She resided in the Basford union for upwards of three years, viz., from September, 1874, to

November, 1879, in such manner and under such circumstances, as would in accordance with the several statutes in that behalf render her irremovable. In September, 1874, she went to the parish of Bulwell, and after residing there for two years and five months went to the parish of Basford, and after residing there for one year and eight months went to the said parish of Bulwell, where she resided till Michaelmas, 1879. The parishes of Bulwell and Basford are in the Basford union.

The question for the Court was whether the residence in the parishes of Bulwell and Basford constituted a settlement within s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61). (1)

Philbrick, Q.C., and *Woollett*, for the respondents, contended that "parish" in s. 34, meant "parish" and not "union."

H. Tindal Atkinson, for the appellants. "Parish," in s. 34, includes "union" as well as parish. All that is necessary to constitute a settlement is a three years' residence in the union, provided that the residence for any one year in any one of the parishes is not broken. By the interpretation clause of 4 & 5 Wm. 4, c. 76, s. 109, "'parish' shall be construed to include any parish, city, ... or any other place or division, or district of a place maintaining its own poor whether parochial or extra-parochial." This includes union. By 9 & 10 Vict. c. 66, s. 1, residence for five years in a parish made a person irremovable from that parish, and s. 5 provided that no person exempted from liability to removal should, by reason of such exemption, acquire any settlement in any parish. By 24 & 25 Vict. c. 55, s. 1, "the period of

(1) Sect. 34: Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient.

Sect. 44: The words herein contained shall be construed as in the Poor Law Amendment Act, 1834, and in the Acts amending or extending the same, and the provisions contained therein and not repealed shall, so far as they shall be consistent herewith, be extended to this Act ....

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three years shall be substituted for that of five years specified in s. 1 of 9 & 10 Vict. c. 66; and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish." Therefore residence for three years in any part of a union made a person irremovable. See *Reg.* v. *Bolton le Sands* (1) as to the effect of 27 & 28 Vict. c. 105, s. 1. Then 28 & 29 Vict. c. 79, by s. 1 repeals so much of 4 & 5 Wm. 4, c. 76, s. 26, as requires parishes in unions to defray expenses of the relief of their own poor, and enacts that such relief shall be charged to the common fund of the union, and by s. 8 substitutes the period of one year for that of three years specified in s. 1 of 24 & 25 Vict. c. 55. Thus residence for one year in any part of a union made a person irremovable. By s. 44 of 39 & 40 Vict. c. 61, "parish" is to have the same meaning as in the above Acts.

LINDLEY, J. I think the respondents are entitled to judgment. Whatever difficulty might be felt at first disappears when the language is studied. The question is what is the meaning of "parish" in s. 34 of 39 & 40 Vict. c. 61. That section is one of several which come under the heading "Provisions as to the law of settlement and removal." Section 34 says, "Where any person shall have resided for the term of three years in any parish .... he shall be deemed to be settled therein"—that is in such parish, "until he shall acquire a settlement in some other parish by a like residence or otherwise." There are two rival theories as to the meaning of "parish," one, that it means parish only, the other that it includes union. In order to decide this question, we turn to s. 44, which refers us to the Poor Law Amendment Act, 1834 and the Acts amending or extending the same. By s. 109 of the Poor Law Amendment Act, 1834 (4 & 5 Wm. 4, c. 76), "parish" and "union" are each defined, and we may say compendiously that parish is there distinguished from an agglomeration or cluster of parishes, and does not include a union. No Act has been cited in which parish means anything else than parish. "Parish," therefore, primâ facie means parish and not union. But it is said this is not so, and certain statutes relating to the irre-

(1) 35 L. J. (M.C.) 54.

movability of paupers are relied on. The first is 9 & 10 Vict. c. 66, ss. 1, 5, and it is impossible to read that Act without seeing that the contrast between union and parish is kept up. The 24 & 25 Vict. c. 55, s. 1, substituting three years for five, leaves the contrast untouched, and 28 & 29 Vict. c. 79, s. 8, throws no further light upon it. At the date of the passing of 39 & 40 Vict. c. 61, the state of things was this: first, union was not the same thing as parish, and, secondly, residence for one year conferred the status of irremovability. The framer of 39 & 40 Vict. c. 61, s. 34, knowing this state of the law as to irremovability and referring to it, but legislating about settlement and not about irremovability, enacts that residence for three years in a parish under certain circumstances confers a settlement in that parish. I think the language is plain, and that the decision of the justices was right.

MATHEW, J. I am of the same opinion. There is nothing to shew that s. 34 meant to confound two things which were kept distinct in previous Acts. We cannot introduce into the statute different words from those to be found there, as we must if we adopt the interpretation suggested by the appellants.

Order of Sessions affirmed.

Solicitors for appellants: *Prior, Bigg, Church, & Adams.*
Solicitor for respondents: *F. E. Hilleary.*

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March 25.

THE GUARDIANS OF THE HOLLINGBOURN UNION, APPELLANTS; THE GUARDIANS OF THE WEST HAM UNION, RESPONDENTS.

Q. B. D.

Poor Law—Settlement—Abolition of Derivative Settlement—The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61) *s.* 35.

Where the settlement of a widowed mother, as well as the settlement of her legitimate children, who are unemancipated and under the age of sixteen, has to be inquired into, the children take the settlement of their widowed mother under the first clause of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61) and are not to be deemed to be settled in the parish where they were born under the last clause of that section, although it cannot be shewn what settlement the children derived from their widowed mother without inquiring into her derivative settlement.

So *held* by Lindley and Mathew, JJ.

CASE stated by the Essex Sessions upon an appeal against an order of removal, adjudging the last legal settlement of Sarah Thorndycraft and her four children to be in the parish of Sutton Valence in the appellant union, and ordering the removal of the said mother and children from the respondent union to the appellant union. The sessions confirmed the order subject to the following case:—

John Thorndycraft the elder was born in 1804, in the parish of Sutton Valence, and lived and was married in the parish of Hackney, where his son John Thorndycraft the younger, was born in 1835, and where the latter married the pauper Sarah in 1866. The four children in question were born of this marriage out of the appellant union, their respective ages being twelve, eight, five, and four. John Thorndycraft the younger died in July, 1875. Neither he nor his father acquired any settlement in his own right. It was admitted that Sarah Thorndycraft the widowed mother was legally settled in the parish of Sutton Valence.

The respondents affirmed, and the appellants denied, that the four children being under sixteen, and resident with their widowed mother, followed her settlement and were removable with her, and this was the question for the opinion of the Court.

Philbrick, Q.C., and *Woollett*, for the respondents. The

children being all under sixteen, and unemancipated (two of them being above and two under seven, the age of nurture), fall within the first, and not within the last, clause of s. 35 of 39 & 40 Vict. c. 61. (1) The object of the Act was to keep children under sixteen with their parent. The last clause does not cut down the effect of the first, and is intended to prevent the expense and trouble of inquiring into derivative settlements, where the settlement of children only is being inquired into, not where the settlement of the parent is being inquired into for the removal of the parent. It cannot have meant to separate mother and children. If so, the children would have to be removed to their four several birth-places. The difference in the words in the first clause "shall take the settlement," from those in the last clause "shall be deemed to be settled," shews that they are intended to apply to different cases. The decisions on which the appellants will rely, *Manchester Overseers* v. *St. Pancras* (2) and *Woodstock Union* v. *St. Pancras* (3) are not in point.

Kingsford, for the appellants. The question of settlement is determined by *Manchester Overseers* v. *St. Pancras* (2) where it was held that the case of an illegitimate child, whose mother's settlement is derivative, falls under the last clause of s. 35, and that the words were too strong to be got over, and the same principle pervades the decision of *Westbury-on-Severn* v. *Barrow-in-Furness*. (4) The object of the Act was not to make a beneficial alteration in the law, but to save the expense and trouble of inquiring into derivative settlements. Where the

(1) Sect. 35: "No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

(2) 4 Q. B. D. 409.

(3) 4 Q. B. D. 1.

(4) 3 Ex. D. 88.

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parent has acquired a settlement the children follow it, but where the parent's settlement is derivative, the children's settlement is their birth-place. This simple rule makes the whole clause consistent. The hardship of separating parent and children existed before the Act. The respondents must assert a double derivative settlement, for the settlement of the mother was not that of her husband, but of his father. There are no words to shew that the latter clause of s. 35 is limited to inquiries into the settlement of children.

LINDLEY, J. I think that the decision of the justices was correct. There is not so much difficulty in s. 35, as at first sight might appear. That section is divisible into three branches. The first abolishes derivative settlements, except in certain cases of which we are only concerned with those relating to children. Confining my remarks to children, the section deals with three cases. The first case, that of children under sixteen who have either a father or a widowed mother must plainly be legitimate—because an illegitimate child has in the view of the law no father and no widowed mother—and with respect to this class the first branch of the section says that such a child "shall take the settlement of its father or its widowed mother, as the case may be." This involves the assumption that the child has a father or a widowed mother who is alive.

The second branch of the section deals with illegitimate children only, and says nothing about being under sixteen. The third clause applies to "any child in this section mentioned," and has been construed in *Manchester Overseers* v. *St. Pancras* (1) to include illegitimate as well as legitimate children. We must read the third clause so as to make it consistent with the first. The third clause applies to children under sixteen not falling within the first clause, and also to illegitimate children whether under or over sixteen. The present is a case specifically provided for by the first clause of the section; it is a case of legitimate children under sixteen and having a widowed mother. The first clause says that such children shall take the settlement of their widowed mother. The rest of the section is general, and there is

(1) 4 Q. B. D. 409.

nothing in it to force us to deal with legitimate children, under sixteen and having a widowed mother, otherwise than as provided for by the first clause.

MATHEW, J. I am of the same opinion. It seems to me the latter part of s. 35 is intended to apply to cases where you cannot ascertain the settlement of the children in the manner pointed out in the earlier part of the section, that is by ascertaining the settlement of the father or widowed mother. When you would have to enter upon an independent inquiry as to the derivative settlement of the parent, not for the purpose as here of finding the settlement of that parent, but in order to find the settlement of the child, this is not to be undertaken, but the birth-place of the child shall be its place of settlement.

Order of Sessions affirmed. (1)

Solicitor for appellants: *Kingsford, Dorman, & Co., for Beale, Hoare, & Co., Maidstone.*

Solicitor for respondents: *F. E. Hilleary.*

RAMSDEN, APPELLANT; YEATES AND ANOTHER, RESPONDENTS.

March 28.

Q. B. D.

Highway, Licence to get Materials for repair of—5 & 6 *Wm.* 4, *c.* 50, *s.* 54—"*Search for, dig, and get in or through*"—*Avenue to a House.*

A licence may be granted to get materials for the repair of the highways under 5 & 6 Wm. 4, c. 50, s. 54, although the materials when got must be carried away by an "avenue to a house," the exception of such an avenue (inter alia) in the section referring only to the digging or getting of the materials, not to the carrying of them away when got.

CASE stated by justices, the facts of which were in substance as follows:—

An application was made to a special sessions for highways held at Horsham, for the division of Bramber, in the county of Sussex, by the respondents, the surveyors of highways of a parish, for a licence to get and carry away materials, for the repairs of the highways in the parish, out of a close called the Barnfield in

(1) Leave to appeal was refused, the Court saying that leave ought to be granted only where there was a difficult question, and here there was none.

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the possession and occupation of the appellant. The licence was granted. Objection was taken by the appellant to the granting of the licence on the ground that the materials, if obtained from the close in question, must be carried away over a carriage-road or avenue leading from a highway to the appellant's house. The question raised by the case was whether the decision to grant the licence was, under these circumstances, correct.

Dodd, for the appellant. The question depends upon the true construction of the 54th section of 5 & 6 Wm. 4, c. 50. The section enables a licence to be granted "to search for, dig, and get materials, if sufficient cannot be had conveniently within such waste lands, &c., in or through any of the several or inclosed lands or grounds of any person whomsoever (such lands or grounds not being a garden, yard, avenue to a house, &c.)." It is contended that the effect of the provision is that a licence cannot be granted to carry the materials through any of the excepted places. The word "get" no doubt in its more restricted sense refers to the digging of the materials, but it may include the carriage of them as well. The word "through" has no effect if the word "get" is construed to refer only to the digging. The only possible meaning of "getting through," is "carrying through." It seems reasonable that the owner should be protected from the annoyance of having stone carts pass along his carriage drive.

Gore, for the respondents. It is clear that the word "get" is equivalent to "win," and does not refer to the carrying away of the materials. The removal of the materials is expressly referred to further on in the section. The word "through" is not to be read with the word "get," but with the previous words. The words are "search for, dig, and get in, or through." The section goes on, "and to take and carry away so much of the said materials as by the discretion of the said surveyor shall be thought necessary to be employed in the amendment of the said highways." There is nothing said and no restriction as to the mode of carrying away the materials. It must be meant that they should be carried away by the ordinary mode of access to the place where they are dug.

Dodd, in reply.

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LINDLEY, J. The question turns on the true construction of the 54th section of the General Highway Act (5 & 6 Wm. 4, c. 50), and it comes to this, viz., whether the carrying of the materials along an avenue is a getting of the materials through an avenue within the meaning of the section. The section appears to deal separately with three matters: first, the getting of the materials; secondly, the carrying of them away; and thirdly, the compensation to be given to the owner of the land. The construction of the expressions used in the first part of the section, viz, "search for, dig, and get in, or through," may be a little obscure. The words "search for" are probably meant to be read with the word "through." It is plain, however, to my mind, that they do not refer to the carrying away of the materials, for that is distinctly provided for by the second part of the section, which provides for the taking and carrying away of the materials. The third portion of the section which provides for compensation likewise contrasts "getting" and "carrying away." It seems to me that the true construction clearly is that, though getting the materials in an avenue is forbidden, carrying them away through an avenue is not. For this reason I think our judgment must be for the respondents.

MATHEW, J. The question seems to be whether in reading this section the word "get" is to be construed as referring only to the "winning" of the materials, or as including their "carriage" also. I agree with my Brother Lindley as to the construction to be placed on the words.

Judgment for the respondents.

Solicitor for appellant: *Bedford.*
Solicitors for respondents: *E. W. & R. C. Mote.*

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Feb. 5.

(C. A.)
Q. B. D.

[IN THE COURT OF APPEAL.]

THE SOUTH EASTERN RAILWAY COMPANY *v.* THE RAILWAY COMMISSIONERS AND THE MAYOR, ALDERMEN, AND BURGESSES OF HASTINGS.

Railway Company—Regulation of Railways Act, 1873 (36 & 37 *Vict.* c. 48)—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict.* c. 31)—*Jurisdiction of Railway Commissioners—Demurrer.*

7 QBD 84
184-7
10 QBD 312

The Railway Commissioners, to whom has been transferred the jurisdiction of the Court of Common Pleas under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), have under that Act jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding, and delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers, for the receiving, forwarding, and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alteration of such station.

If the Railway Commissioners act beyond their powers, prohibition will lie, notwithstanding the power of the Court of Common Pleas over railways under 17 & 18 Vict. c. 31, was transferred to such commissioners by 36 & 37 Vict. c. 48.

In a declaration in prohibition by a railway company against the Railway Commissioners it appeared that a complaint, under the Railway and Canal Traffic Act, 1854, had been made to the commissioners against the company, and that the commissioners proposed to order certain things to be done by the company in respect of such complaint, and that the company denied the jurisdiction of the commissioners to hear and determine the complaint or any part of it, and prayed for a writ to prohibit the commissioners "from further proceeding in any way touching the premises before them."

The Court, being of opinion that the commissioners had jurisdiction over the general matter of the complaint, and that they had jurisdiction to order some of the things they proposed ordering, though not to order the others:—

Held (Brett, L.J., dissenting), that a general demurrer by the commissioners to the whole declaration should be allowed.

THE defendants demurred to a declaration in prohibition, in which the plaintiffs, the South Eastern Railway Company, prayed a writ to prohibit the defendants, the Railway Commissioners, from further proceeding in any way in the matter of an application which had been made to the commissioners by the corpo-

ration of Hastings, under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and the Railways Regulation Act, 1873 (36 & 37 Vict. c. 48), for an order enjoining the plaintiffs, first, to enlarge the Hastings station, and to provide better booking office, waiting room, refreshment room, and general accommodation therein; secondly, to lengthen and deepen the existing platforms of the station, and to provide additional platforms; thirdly, to provide better warehouse accommodation for goods at the station; fourthly, to provide cattle pens at the station, and additional sidings for cattle trucks; and, fifthly, to enlarge the platforms of the St. Leonards station and to provide the said station with a new approach by a direct route.

The application was in writing, and it contained, inter alia, the following allegations, viz.:—

"7. The South Eastern Company has for a long time neglected to afford and still neglects to afford reasonable facilities for receiving, forwarding, and delivering traffic at and from Hastings station, in manner appearing from the 8th, 9th, 10th, 11th, 12th, and 13th paragraphs of this application.

"8. There are only two platforms. Passenger trains are frequently brought up, and the passengers are requested to alight, short of these platforms. Each of these platforms is used indiscriminately for the up and down traffic of both the South Eastern and the Brighton Railway companies. During the day about sixty passenger trains arrive at or start from the platforms. A very large and varying number of goods and cattle trains of both companies run to and from the stations, and both companies frequently run excursion trains.

"9. The South Eastern Company has only one booking office for passengers of all classes, and such booking office has only one window, whereby great delay and confusion are caused.

"10. There are so many trains starting at the same time in different directions within too small a space, that it is impossible for the servants of either company to distinguish correctly between them, whereby intending passengers by the South Eastern Company frequently take wrong trains.

"11. Intending passengers by the South Eastern Company are frequently excluded from the station in consequence of the

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platform being over crowded. The station yard is wholly uncovered.

"12. The warehouse accommodation for goods is wholly insufficient. Numerous traders of the town are prevented from receiving in due time goods consigned to them, and suffer great pecuniary loss. The South Eastern Railway Company possess one warehouse only, and allow the Brighton Company, who possess none, to use such single warehouse, whereby great confusion is caused.

"13. There are no cattle pens. Beasts and sheep are frequently injured from having to be loaded or delivered in too small a space, and are frequently detained many hours in cattle trucks, whereby many traders of the town of Hastings have suffered and do suffer great pecuniary loss.

"14. The South Eastern Company have long neglected to afford, and still neglect to afford, reasonable facilities for receiving, forwarding, and delivering traffic at and from St. Leonards station, in manner appearing from the 15th, 16th, and 17th paragraphs of this application.

"15. There is only one approach to the down line platform, and such approach is steep, narrow, and dangerous. The end of such approach is not large enough to turn a four wheel carriage in. The position of such approach in regard to the requirements of the traffic is such that passengers, arriving at the down platform and desirous of reaching any place on the east side of Gensing Valley, are obliged to pass by a circuitous route of 1000 yards. The South Eastern Company are sole owners of lands through which a direct route of 160 yards might be made to replace such circuitous route.

"16. The platforms are too narrow, being not more than ten feet wide, and part of this space is taken up by columns.

"17. The arrival platform has one small waiting room for ladies only, and such waiting room is too small. The departure platform has one waiting room for ladies only, and such waiting room is too small. Such last-named platform has also a general waiting room, which is also used as a booking office."

The declaration in prohibition stated that the plaintiffs, the railway company, had appeared and put in an answer to the said

application, whereby they had submitted that, as a matter of law, the Railway Commissioners had no jurisdiction to hear or determine the application, nor to make the order or grant the relief therein prayed for. The plaintiffs thereby further stated that the Railway Commissioners afterwards, wrongfully assuming jurisdiction, heard and determined the application, although the plaintiffs, before and at such hearing, protested that the commissioners had no jurisdiction to hear or determine the application or any part thereof; and the plaintiffs concluded by praying for a writ of prohibition to prohibit the commissioners from further proceeding in any way touching the premises aforesaid before them.

The declaration also set out a judgment which the Railway Commissioners gave on the 18th of May, 1878. The nature of this, and how the Railway Commissioners thereby proposed to deal with the complaints of the Hastings corporation, is fully set out in the judgment of Cockburn, C.J., in the report of the case in the Queen's Bench Division. (1) By it the Railway Commissioners contemplated ordering the railway company to construct or enlarge various structural works, and therefore the majority of the Queen's Bench Division (Cockburn, C.J., and Manisty, J., Lush, J., dissenting), held that the Railway Commissioners had no jurisdiction to entertain the application and to make the orders proposed, and accordingly judgment on the demurrer was given for the plaintiffs in prohibition.

The defendants the Railway Commissioners only, and not the defendants the corporation of Hastings, appealed from this judgment.

Nov. 5, 6, 8. *Sir H. Giffard, Q.C.*, and *A. L. Smith*, for the Railway Commissioners.

Littler, Q.C., and *Willis, Q.C.* (*A. M. Bremner*, with them), for the railway company.

During the argument the question was started whether prohibition would lie against the Railway Commissioners, as the power of the Court of Common Pleas over railway companies under 17 & 18 Vict. c. 31, was transferred to the Railway Commissioners by 36 & 37 Vict. c. 48, and the Court of Common Pleas being

(1) 5 Q. B. D. 220–224.

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a superior Court could not have been prohibited by any other Court, and whether therefore the only way of disputing the validity of an order of the Railway Commissioners was not by a case stated for the opinion of a superior Court under s. 26 of 36 & 37 Vict. c. 48. In support of the contention that prohibition would lie it was urged that the Railway Commissioners were not a Court of Record, and the opinion of the Scotch Courts in the *Caledonian Ry. Co.* v. *Greenock and Wemyss Bay Ry. Co.* (1) was referred to.

[LORD SELBORNE, L.C. We are all agreed that there is power to prohibit the Railway Commissioners.]

The case was then argued on its merits. It is not necessary to give the arguments, as the decision went on the construction of ss. 2 and 3 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), which are fully stated and commented upon in the judgments.

Cur. adv. vult.

1881. Feb. 5. The following judgments were delivered :—

LORD SELBORNE, L.C. The order of the Queen's Bench Division which is appealed from in this case, by overruling generally the demurrer of the Railway Commissioners to the declaration in prohibition of the South Eastern Railway Company, has affirmed the incompetency in point of law of the commissioners to order the company (upon an application by the corporation of Hastings) to execute certain improvements of, or connected with, their stations at Hastings and St. Leonards.

If the commissioners have authority to order those improvements, or any of them, to be made, it must be derived from the 3rd section of the Act 17 & 18 Vict. c. 31, which empowered the Court of Common Pleas (or any judge of that Court) upon complaint made against any railway company of anything done or of any omission made in violation or contravention of that Act, to hear and determine the matter of such complaint, and on being satisfied (after due inquiry) of its truth, to issue a writ of injunction restraining such company from further continuing such contravention or violation of this Act, and enjoining obedience to

(1) 5 Scotch Sess. Cas. 4th Series, 995.

the same. Obedience to any such injunction was to be enforced by attachment and by other penalties. By a later Act (36 & 37 Vict. c. 48) the power thus given was transferred to the Railway Commissioners.

The first observation which arises upon this enactment is, that it does not enable the commissioners to impose upon a railway company any new duties or obligations depending upon any mere exercise of the commissioners' own judgment. Their authority is only to inquire into and to prevent violations or contraventions of the statute. For this purpose alone they may issue a writ of injunction, the form of which (according to the 5th rule made under the Act by the Court of Common Pleas) was to be prohibitory if the statute were contravened by any positive act, and mandatory if it were contravened by any mere omission or non-feasance. (1) In both cases alike the obligation to be enforced by the writ must have been already created by the statute. The question into which the Court was to inquire was not one of expediency but of fact. Such an authority was in harmony with the general functions of a court of law, although its exercise might require special powers (such as those to conduct inquiries by engineers or others), and although it was given in a very peremptory form, all appeal (in the proper sense of that word) even from the decision of a single judge being excluded. A discretionary power, to dictate to a company what structural works it should or should not execute for the purposes of its undertaking, would have been evidently much more suitable to a practical and scientific than to a legal tribunal.

What, then, are the obligations imposed upon railway companies by this statute? They are contained in the 2nd section, and are (substantially) three in number. First, a positive obligation to "afford, according to their respective powers, all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles." "Traffic" (according to the interpretation clause, s. 1), includes "passengers and their luggage and goods, animals, and other things conveyed by any

(1) See 15 C. B. 472.

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railway company." "Railway" includes "every station of, or belonging to, such railway, used for the purposes of public traffic." The second obligation is to give no undue preferences; the third to do whatever may be necessary to enable the company's own line, and any other line connected with or having a terminus near it, to be used by the public as continuous lines of communication.

It is unnecessary to state more particularly the terms in which the second and third obligations are created; the first alone being material to the present question. I notice, only to set it aside, the argument of the respondents, that this has no reference to any traffic of which a company is itself the original carrier upon its own line. There is nothing either in the words or in the reason of the thing to warrant any such restricted construction. A company may carry or not upon its own line as it thinks fit; and if it does so, may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passenger or goods traffic, it comes (in my opinion) under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the 2nd section of the Act.

With respect to stations, there is no obligation to establish them at any particular places or place unless the company thinks fit to do so. The railway (as interpreted by the Act) only includes existing stations "used for the purposes of public traffic." But when the company has in fact opened a station at a particular place, and actually uses it for the purposes of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its powers) all reasonable facilities for "receiving," "forwarding," and "delivering" such passengers and goods. It may not in all cases be a very easy thing to determine whether that obligation has been fulfilled or not. Nothing less than reasonable proof that it has not been fulfilled can authorize the commissioners to interfere with the discretion of the company as to the arrangements or management of any of its stations; and even then the Act does

not appear to contemplate an order for the execution of any particular works, if it can be obeyed without them. But I cannot assent to the argument that, according to the true construction of this 2nd section, the obligation to "afford all reasonable facilities," &c., is circumscribed by the precise extent, capacity, and structural arrangements of the buildings, booking-offices, and platforms, &c., *de facto* provided at the time of complaint by the company, if these are insufficient for the ordinary traffic of the station, and if by alterations or other improvements which the company has adequate power to make, all necessary facilities might be afforded. The words, "according to their respective powers," as well as the general scope of the enactment, seem to me to be very much opposed to so limited a construction. I am, therefore, of opinion that a company does violate and contravene the Act if (having sufficient powers) it keeps its platforms, booking-offices, and other structures at any station in such a condition, as to space and other arrangements, as to cause dangerous or obstructive confusion, delay, or other impediment to the proper reception, transmission, or delivery of the ordinary traffic of that station, whether consisting of passengers or of goods.

Being of that opinion, I am unable to hold, upon the terms of the complaint itself, that the matter of it (which I regard as summed up in the 7th and 14th paragraphs) was beyond the scope of the commissioners' jurisdiction. The prayer with which that complaint concluded may have been improper either in form or in substance, but if the matter itself was within the jurisdiction of the commissioners, I conceive there is so far no ground for a prohibition.

The matter indeed does not now remain exactly in that state. The commissioners proceeded to deliver what is called their judgment, and although no writ of injunction was issued (indeed I find it difficult to collect from the judgment in what precise form the commissioners intended it to issue), still it is plain to me from the points noted for argument before the Queen's Bench Division, on the part of the commissioners, that all parties thought it convenient, practically, to treat that judgment as embodying the substance of an order which if not prohibited, they would have made. It is proper therefore (if not necessary), that we should

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explain the view we take of the several matters and things which for this purpose appear to have been treated as if they had been ordered, as the effect of our decision might otherwise be misunderstood.

One of these matters is an extension of the platform accommodation at the Hastings station, according to a plan prepared by the chief engineer, and approved by the directors of the company. The insufficiency of the platform accommodation appears to have been admitted by the company, and it may be that if the plan prepared had been altogether within its powers, and had been at the company's instance, or by its consent, embodied in an order of the commissioners, it would not have been open to the same objection as if it had been dictated by the commissioners to the company. But this plan appears by the judgment to be dependent for its practicability upon the enlargement of a certain bridge, which the company at the time of the complaint had not power so to enlarge, and, although it has since entered into an agreement with the owners of the land requisite for that purpose, the performance of that agreement involves (among other things) a money contribution by those owners towards the intended works. It appears to me to be impossible to hold that any particular improvements dependent upon the execution of such a plan could have been obligatory under the statute, the statutory obligation being limited by the company's powers. The company, therefore, had not in this respect "violated" or "contravened" the Act; and the commissioners could not order it to execute these particular works. An objection similar in principle applies to the suggestions (if meant to be imperative) contained in the judgment on two other subjects—the goods yard at Hastings, and the approaches to the St. Leonards station. It is therefore superfluous to inquire (though on this point I certainly do not differ from Lord Justice Brett) whether, if the works contemplated by those particular suggestions had been within the company's powers, they could have been regarded as necessary to afford reasonable facilities for the purposes specified in the Act.

That question however arises as to some other things which the commissioners have also proposed to order, and which (so far as

appears), the company might have power to do. Of these, the reservation of part of the station buildings at Hastings for refreshment purposes, and the covering over of certain parts of the platforms, &c., at both stations, on account of the exposure of the site, and the resort of invalids to St. Leonards and Hastings, seem to me to be clearly not necessary as "facilities for the receiving, forwarding, or delivering traffic upon the railway," however desirable they may be for the comfort or convenience of passengers.

The enlargement in some reasonable way (whether by platform or by waiting-room accommodation) of a space insufficient for the proper reception of ordinary passenger traffic, and some proper provision for the delivery of cattle from the company's waggons, without those risks which seem now to attend their passage through the station yard, are things which approach more nearly to my conception of facilities which the commissioners, in the due exercise of their jurisdiction, might hold to be necessary and required by the Act. I am by no means prepared to say that there is no form of mandatory injunction which they can properly issue for these purposes. It does not, however, follow that they can order a certain number of waiting-rooms to be provided, or dictate their classification, position, or dimensions, or enjoin the company to make cattle-pens upon a particular piece of ground now used for other purposes. It may well be that by the execution of such works as these, or some of them, the obligation imposed upon the company by the statute might be fulfilled, nor should I be disposed to impute any excess of their jurisdiction to the commissioners, if they were merely to indicate for the consideration of the company, these or any other convenient means by which in their opinion that obligation may be fulfilled. But between any such reasonable suggestions, and a peremptory order for the execution of these particular works, there is a wide difference. I can find no warrant in the statute for the assumption by the commissioners of a general control in matters of this kind over the discretion of the company as to the best means (when there is a choice of means) of fulfilling their statutory obligations.

There remains the point as to booking-office accommodation at both stations. The commissioners proposed to order that this

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should be increased in a manner as to which I consider them to have had jurisdiction to make such an order as I conceive them to have intended. The result is, that the commissioners had in my opinion jurisdiction over the general matter of the complaint as summed up in paragraphs 7 and 14, and had also jurisdiction to order some at least of the things contemplated by their judgment, provided they did so in a proper manner and form; but that as to other things which they (apparently) intended to order, they had no jurisdiction, partly because these things were beyond the company's powers, partly because they were not facilities reasonably necessary for the particular purposes mentioned in the Act, and partly because they would have required particular structural works to be executed which are not prescribed by the Act, and which cannot be supposed to be the only possible means of affording the facilities which the Act does require.

Taking this view I should have been prepared to allow the demurrer in part and to overrule it in part, if I had thought either that this conclusion was rendered technically necessary by the statements and prayer of the declaration in prohibition, or that upon the whole facts, appearing by the declaration and admitted by the demurrer, it was a course open to the Court and practically convenient for the purposes of justice. But the declaration, according to its true construction, seems to me to challenge altogether the jurisdiction of the Railway Commissioners to take any cognizance of the complaint of the corporation of Hastings. It begins by saying that the commissioners "wrongfully assumed jurisdiction to hear and determine the application, notwithstanding the protest of the railway company that they had no jurisdiction to hear or determine the said application, or any part thereof;" and, after stating in extenso the judgment pronounced by the commissioners on the 18th of May, 1878, and the application itself and the company's answer to it, it concludes by asking for a writ to prohibit the commissioners and every of them "from further proceeding in any way touching the premises aforesaid before them." I do not think that this form of declaration makes it technically necessary for the Court, on a general demurrer by the defendants in prohibition, to do more than say that the commissioners either have or have not jurisdiction over the matter

brought before them by the complaint of the corporation of Hastings. If, on the face of the complaint, they had no jurisdiction over any part of that matter the demurrer must, of course, be overruled. If there were some matters in that complaint over which they had, and others over which they had not jurisdiction, the demurrer ought to be partly allowed and partly overruled. But if (which is my own view) they had jurisdiction over the whole matter of the complaint as summed up in the 7th and 14th paragraphs, then I think that they ought to be permitted to deal with that whole matter, by making some order upon it which (as yet) they have not done, and that it cannot be technically wrong upon such a record to allow the demurrer generally.

It is indeed true that among the facts stated in the declaration and admitted by the demurrer is the long and elaborate judgment of the commissioners, declaring their intention to deal with the complaint of the corporation in a way which as to some matters would (according to the view of this Court) be in excess of their jurisdiction; so raising the question whether it may not be competent for us in that state of the commissioners' proceedings (as shewn by the record) partly to allow and partly to disallow the demurrer; just as if a prohibition had been asked, not against any further proceeding whatever on the complaint of the corporation, but against an order founded on the terms of the commissioners' judgment. I assume that this might have been a proper and a convenient course, if it had been really possible to collect with reasonable certainty what the exact nature and form of the order to be drawn up upon the commissioners' judgment would have been. This, however, I am myself unable to collect from the record.

I can see clearly enough, as to some particular matters, that the commissioners did intend to make an order which I should have thought beyond their jurisdiction. I am by no means equally sure whether, as to any part of the matters before them, they contemplated making an order which I should have thought in form as well as substance right. As to several matters of great consequence, it seems to me to be quite uncertain whether they saw their own way to making any order at all, unless the parties relieved them from the necessity of doing anything by coming to

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some agreement. The judgment concludes with these words, "with regard to the order to be drawn up, as the carrying into effect of this decision involves a considerable amount of co-operation between the company and the applicants, we suspend the issue of the order for two months, with liberty for either party to apply to us in the interval as they may be advised." I do not think it would tend to the more convenient administration of justice in this case if this Court were to endeavour in the order to be now made upon the demurrer, to draw a line between the good, the bad, and the ambiguous parts of that judgment. It appears to me to be technically not wrong, and practically to be most convenient, to allow the demurrer generally, without prejudice to any new application for the prohibition, if the commissioners should make any order, or issue any writ not authorized by the statute. I feel confident that the commissioners having our opinions before them will not now make such an order as they probably might have made, if no proceedings had been taken in prohibition.

Those proceedings, therefore, will not have been fruitless, and as neither party has been wholly right, or wholly wrong, I think there ought to be no costs on either side. The Lord Chief Justice agrees in this view, and the judgment of the Court will therefore be to reverse the order of the Queen's Bench Division and allow the demurrer of the Railway Commissioners, without costs and without prejudice to any new application which the company may be advised to make for a prohibition, after any writ of injunction or other order, upon the complaint of the corporation of Hastings shall have been issued by the commissioners.

LORD COLERIDGE, C.J. I agree in the judgment just delivered by the Lord Chancellor.

BRETT, L.J. In this case the plaintiffs in prohibition originally moved for a writ of prohibition, first, on the ground that the complaint preferred by the corporation of Hastings ought not to have been entertained by the defendants in prohibition; secondly, on the alleged ground that the defendants were about to make an order which in several suggested particulars would exceed their jurisdiction. As to the first, it seems to me impossible to say that

the commissioners had not jurisdiction to entertain the complaint which prays for redress of a grievance described in the exact words of the statute; but, as to the second, if the alleged order would exceed jurisdiction, and the intention to make it is proved or not denied, such intention is sufficient cause for prohibition. The Divisional Court being of opinion that the subject-matter raised questions too important to be determined on mere motion, directed, according to received practice, the plaintiffs to declare in prohibition, so that the grounds on which the prohibition was claimed might appear upon record. The plaintiffs accordingly declared, setting out the complaint which they alleged the defendants had entertained, and the order which they alleged the defendants intended to make. The defendants pleaded a general demurrer to the whole declaration.

That admits that the defendants had entertained the complaint and did intend to make an order, and that it would be an order in the terms alleged in the declaration. A question upon the demurrer then is whether it is within the jurisdiction of the defendants to make all or any part of that order.

This raises first, the question what would cause such an order, or part of it, to be beyond jurisdiction as distinguished from being merely erroneous. If no part of the order could legally be made under any circumstances in any form, the whole is beyond jurisdiction. If there are separate parts which could under no circumstances in any form be legally made, those parts are beyond jurisdiction. But if the whole, or any part, could under some circumstances be properly made, though they would be improperly made under the circumstances of the particular case, that would be error and not excess of jurisdiction.

The jurisdiction of the defendants given to them by the statute 36 & 37 Vict. c. 48, is that which was given to the Court of Common Pleas by the statute 17 & 18 Vict. c. 31. That jurisdiction is "to hear and determine the matter of any complaint made by any company or person against a railway or canal company of anything done, or of any omission made, in violation or contravention of this Act, and if it should be made to appear that anything has been done or omission made in violation or contravention of this Act, to issue a writ of injunction restraining

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the company from further continuing such violation or contravention of this Act, or enjoining obedience to the same" (section 3). The matter material in this case which is enjoined by the Act is that "every railway company shall, according to its powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the railway belonging to or worked by such company" (section 2). The word "railway" shall include "every station of or belonging to the railway used for the purpose of public traffic."

From these enactments the following propositions are to be deduced; that the only question which the commissioners have jurisdiction to entertain on any complaint is, whether what is complained of is something done or omitted to be done in violation or contravention of the Act; that any order which they may make can only properly be an order restraining the company from further continuing to do certain things which are in violation or contravention of the Act, or directing the company to obey the Act as to certain matters omitted to be done by the company in violation or contravention of the Act. Applying these propositions to the present dispute, it follows that the defendants had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic. This description of the railway and stations, namely, that they are used by the company, confines their jurisdiction to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new station. Their jurisdiction was further confined to this, that they could only properly deal with matters which might facilitate or impede the receiving, forwarding, or delivering of passengers or goods upon or from the existing railway or stations; they had no jurisdiction to entertain or deal with matters otherwise affecting passengers or goods. The power to make an order being instituted by a statute which describes the kind of order it enables the tribunal to issue, the jurisdiction of the commissioners is also confined to making such an order as is described in the statute and formulated in the rules. (1) The order, therefore, can only legally

(1) See 15 C. B. 473.

be made with regard to matters which the commissioners may properly entertain, that is to say, with regard to matters which by their omission or commission may affect facilities in receiving, forwarding, or delivering traffic. The order may direct the discontinuance of acts complained of, if they are done in violation or contravention of such facilities, or may order that certain omissions complained of shall be supplied, if they are in violation or contravention of the same facilities. To form an opinion whether omissions complained of are an omission of reasonable facilities, it may be right, and even necessary, that the commissioners should receive and consider evidence of specified schemes or methods for supplying the alleged omission; but the order can only direct that the omission must be supplied either wholly or to a declared reasonable extent. If the omission can be supplied in more than one way, the commissioners have no jurisdiction to declare which way is to be preferred. The discretion as to such a matter rests with the company. The commissioners, therefore, in this case, might properly receive evidence of specific methods of supplying the alleged omissions of reasonable facilities for the receiving, forwarding, and delivery of passengers or goods, and might properly consider whether the nature and expense of such specific methods of supplying facilities made the omission of such facilities reasonable or unreasonable; but the commissioners had no jurisdiction to order that the omissions, which they determined ought to be supplied, should be supplied by any specified works to be constructed in any specified form or in any specified locality. The obligations dealt with by the statute, which are material to be considered in the present judgment, are confined to facilities for the receiving, forwarding, and delivering of traffic upon and from the railway belonging to or worked by the company, or upon and from stations used by the company. This confines the jurisdiction to make any order to a power to make it with regard to the existing railway or the existing stations. It is necessary, however, to determine what is the legal limitation of the terms so used. It was urged that such terms prevented the commissioners from making any order in any form which would necessitate the making by the company of any structural alteration or addition whatever. But the terms "railway," and "railway station," are

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not mere legal terms; they are the descriptions in ordinary phraseology of well understood things of an ordinary kind. The terms, as used in the statute, are therefore to be construed as such descriptions. If there is an omission of some reasonable facility within the Act in the working of the railway, which omission can be reasonably supplied without altering the railway, using the term "railway" as a description of that which is ordinarily understood by people of ordinary sense to be "a railway," there is nothing in the Act which says that it would be an answer on the part of the company to an order to supply the omission, that it could not be supplied without some structural alteration or addition. For instance, if additional points or sidings were requisite for safety at an existing junction, no ordinary person would say that the addition of a set of points or the laying of a siding rail would make a new railway; they would term it an adaptation or improvement of the existing railway; though an order to make a single line railway from A. to B. into a double line railway would be considered by all ordinary persons of intelligence to be an order to construct a substantially new line of railway or new railway. So as to a "station," the term is not in ordinary sense used as a description merely of the actual existing structures at a station, but as the description of a space actually set apart for, and generally used as, a resting place for traffic, or a place for dealing with it in a particular way, although every part of the space is not covered with structures, or used for passing along, or for deposit. An order, therefore, to supply the omission of reasonable facilities at a given station would not be beyond jurisdiction, merely because such omission could not be supplied without some structural alteration or addition made at such station used as describing such space; but it would be beyond jurisdiction if it required and insisted upon the supplying of an alleged omission which could not be obeyed, and which, it might be admitted, could not be obeyed without what every ordinary person would reasonably say was the making a new station or adding to the existing station, so as to make it a different station, the distinction as before being between adaptations or improvements of existing works or an existing station, and the execution of substantially new works or the making of a substantially different station.

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Applying the above rules to the different matters included in the proposed order, the direction to extend the limits of the existing station is not an order which can be obeyed by improving or adapting the existing station, but only by substantially making a station different from the existing station and is therefore beyond jurisdiction. An order in any form to do this would be beyond jurisdiction. So as to enlarging the bridge. The order to extend the platform accommodation is an order dealing with a matter within the jurisdiction of the commissioners, if there was some legal evidence of a want of reasonable accommodation in that respect for receiving or forwarding the average number of passengers. If there was evidence before the commissioners that the platform accommodation for getting into, or out of, or waiting for, trains was not reasonably sufficient for the passenger traffic, and that further accommodation in that respect could be reasonably given within the limits of what might reasonably be treated, as above defined, as the existing station, the commissioners might legally have declared that there was an omission of reasonable facilities in respect of platform accommodation, and might have enjoined the company to supply further platform accommodation to a specified extent as to twice the existing extent, or so as to accommodate so many more passengers; and the commissioners might properly have received evidence of specific schemes of improvement so as to determine what amount of further accommodation it would be reasonable to require; but the commissioners exceeded their jurisdiction, by ordering the platform to be extended according to the plan of the engineer, that is to say, in one way only. If they could make an order in such a form, their order would be disobeyed though an equal accommodation could be given in some other way. They have no power under any circumstances to make an order in any form to such effect. Therefore the order so framed is an excess of jurisdiction. The order as to further protection from weather would have been within jurisdiction if it had been made with regard to passengers as such; but it exceeds, because it is made in order to protect persons visiting Hastings as invalids, although it may protect with quite reasonably sufficient effect passengers as such. The order as to additional waiting-rooms would have been correct if upon some legal evidence the com-

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missioners had determined that there was a want of reasonable accommodation in that respect, which want could be supplied by reasonable alterations of or additions within the existing station, although such alterations or additions involved structural alterations or additions, and had ordered further waiting-room accommodation to a specified extent to be given; but the order is in excess of jurisdiction, because it directs absolutely certain specified works to be done. The order as to refreshment accommodation is further beyond jurisdiction, because it does not come within the terms of facilities for receiving or forwarding passengers. The order as to the delivering of tickets is right in every respect. The order as to the goods shed and sidings would have been right if it had been confined to ordering an extension within the existing station; but the order to seek for powers to enlarge the goods station is in excess. The order as to cattle pens seems to be right, though the order to restore the raised platform to its original use is in excess. The order as to the approach to the station is in excess in every respect. In the result, therefore, the greater part of the proposed order is in excess of jurisdiction, either because it deals with matters with which the commissioners had no authority to deal by way of order at all, or because it deals with matters, with which the commissioners might legally have dealt by some orders, by orders which are in terms in which they have no authority to make an order under any circumstances. Nevertheless, there are two separate orders made unobjectionally, with regard to two matters of complaint as to which the commissioners might legally make order, and although those orders are unimportant as compared with the others, yet they are substantial enough to require consideration. And the declaration proposes prohibition against entertaining at all the original complaint. There arises therefore a question of pleading, which is, whether as the demurrer is pleaded to the whole declaration it is not too large, and whether in consequence it ought not to be wholly overruled. This question may be considered in two forms; first, as it is a demurrer to a declaration in prohibtion; secondly, as if it were a demurrer to an ordinary pleading. As to the first it is within the statute, 1 Wm. 4, c. 21, s. 1, which enacts that "to a declaration in prohibition the party defendant may

demur, and conclude by praying that such writ may not issue, and *judgment shall be given that the writ of prohibition do or do not issue as justice may require.*"

But this does not seem to me to give a power to distribute a judgment upon a demurrer, if it could not be done upon a similar demurrer in ordinary pleadings. We must, therefore, consider the question in the second aspect. That where an inferior Court acts within its jurisdiction as to part, but exceeds as to part, a prohibition, though moved for as to the whole, may issue as to the part in excess, seems to have been early decided: see Comyn's Digest Prohibition (F. 17), and *Lush* v. *Webb* (1); and Buller's Nisi Prius, p. 218, b. It seems to follow that, after declaration in prohibition and traverse, and trial, the judgment might be to prohibit as to part and to award a consultation or otherwise give judgment for the defendant in prohibition as to the rest. This being so, the question is raised as to what is the proper judgment on a demurrer to the whole of a declaration in prohibition. If the demurrer is to the whole declaration, and part of the declaration be good and part bad, should the judgment on demurrer be absolutely in favour of the plaintiff, or for the plaintiff as to the good and for the defendant as to the bad? There has been a difference of judicial opinion. The origin of the dispute is described with the usual learning of Mr. Serjeant Manning, in the note to *Hinde* v. *Gray* (2), and it is there suggested that the doctrine of overruling a demurrer as too large, and therefore giving judgment absolutely in favour of a pleading admitted to be good as to one separate part of it, but bad as to another separate part of it, was a novel doctrine, and was contrary to the older decisions. This note, written in 1840, changed the opinion of Parke, B., as expressed by him in 1838, in *Boydell* v. *Jones.* (3) For in 1842, in *Briscoe* v. *Hill* (4) he said, "With respect to the subject of a demurrer being too large, there is a very learned note of my Brother Manning, which, in my opinion, is entitled to considerable weight." "The question is," he says, after describing the practice, "is that practice right or not, or ought not the Court on such demurrer to give judgment on the whole record according to

(1) 1 Sid. 251.
(2) 1 Man. & G. 201.
(3) 4 M. & W. 451.
(4) 10 M. & W. 741.

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the truth? I think the observations in that note are entitled to considerable weight, and I am inclined to think the practice has been wrong, and that the judgment on demurrer should be given on the whole record, according to the truth." In 1845, in *Slade* v. *Hawley* (1) he said: "There is an able note of my Brother Manning in the case of *Hinde* v. *Gray* (2), which tends strongly to shew that the practice of overruling demurrers as being too large is incorrect, and that the Court ought to give judgment on the whole record, according to the truth." And in *Dawson* v. *Wrench* (3) he said, "formerly if a demurrer was too large, the Court gave judgment generally against the party demurring. That rule was imported from courts of equity but is incorrect with respect to courts of law, as pointed out by my Brother Manning in a note to the case of *Hinde* v. *Gray*." (2) The higher justice of this later view of Parke, B., seems obvious. The futility of the intermediate practice cannot be better exemplified than by the description of the result of it given by Parke, B. in *Boydell* v. *Jones*. (4) The later view of Parke, B., is shewn in the note by Serjeant Manning to be in accordance with the ancient decisions of the Common Law Courts. I am of opinion that the later view of Parke, B., is correct, and that upon a demurrer to the whole of a pleading which contains allegations capable of being separated, some of which allegations are correct and some incorrect, the judgment on the demurrer should be distributed, and should be in favour of the good and against the evil pleading. The judgment on the demurrer in the present case should therefore be against the demurrer as to all the different orders but two, and in favour of the demurrer as to entertaining the complaint as to two. This judgment does not preclude the commissioners from making, in future, upon fresh complaint of a continuing omission, as to certain of the points which have been discussed in this case, such an order as has been pointed out would have been legal.

Comparing the relative importance of the two correct parts of the order of the commissioners with the many held to be illegal, I should have been of opinion that the appeal had so far failed that the defendants in prohibition should pay the costs of the

(1) 13 M. & W. 761.
(2) 1 Man. & G. 201.
(3) 3 Ex. 365.
(4) 4 M. & W. 451.

appeal; but on the question of costs, I do not venture finally to differ.

Appeal allowed, and Order for prohibition reversed.

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Solicitor for Railway Commissioners: *Solicitor to the Treasury, Hare & Fell, agents.*

Solicitor for South Eastern Railway: *W. R. Stevens.*

[IN THE COURT OF APPEAL.]

Feb. 16.

IN RE COPP.

(C. A.) C. P. D.

Practice—Costs as between Solicitor and Client—Limit where not more than 20l. Claimed—County Court Act, 1856 (19 & 20 *Vict. c.* 108), *s.* 36.

The 36th section of the County Court Act, 1856, which fixes a limit to costs, as between solicitor and client, in actions where not more than 20*l.* is claimed, applies to county court actions only.

APPEAL from the refusal of Grove and Lopes, JJ., in affirmance of Pollock, B., at chambers, to order a master to review the taxation, as between solicitor and client, of the costs in the action of *Drew* v. *Tead.*

Mary Drew had instructed her solicitor, Mr. Copp, to sue Mrs. Tead for a debt of 13*l.* 3*s.* 9*d.* incurred on account of goods sold and delivered. Mr. Copp had sued for the debt in the superior Court (prior to the Judicature Acts), and recovered judgment for the 13*l.* 3*s.* 9*d.*, but without costs, by reason of the application of s. 5 of the County Court Act, 1867 (30 & 31 Vict. c. 142).

Mrs. Drew afterwards disputed Mr. Copp's charges in the matter, and obtained an order for the taxation of his bill of costs as between solicitor and client.

The taxing master being of opinion that the case was governed by the County Court Act, 1856 (19 & 20 Vict. c. 108, s. 36) (1),

(1) County Court Act, 1856, s. 36: "Where in any action the debt or damage claimed shall not exceed twenty pounds, an attorney shall not be entitled to recover from his client any further costs or charges in the conduct of such suit than those mentioned in 9 & 10 Vict. c. 95, s. 91, unless upon taxation of costs the registrar be satisfied, by writing under the hand of the client, that he has agreed to pay further costs or charges; and in such case the

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allowed costs on the county court scale only, although Mr. Copp contended that that section had no application.

Pollock, B., and afterwards Grove and Lopes, JJ., upheld the view of the master, and refused to order the master to review his taxation. Against this refusal Mr. Copp appealed.

R. O. Lane, for Mr. Copp. The sections in pari materia with s. 36 of the County Court Act, 1856, as well as that section itself, shew clearly that by the words "in any action" is meant "in any action in the county court," and that actions in a superior Court were not intended to be dealt with by s. 36.

F. Turner, for Mary Drew. The words "in any action" grammatically include an action in a superior Court, and must be taken to include such action, unless there be anything in the context to shew a contrary intention. So far from there being anything to that effect in the context, it points the other way. In the preceding sections, 31, 32, and 33, "county court" judges and proceedings in "county courts" are spoken of expressly, and in ss. 33 and 34 the taxation of costs is dealt with by special reference to s. 33. The only fair inference is, that in s. 36, where no such limitation or reference is used, new ground is broken, and actions in any Court whatever are intended to be dealt with.

BRAMWELL, L.J. I not only do not agree with the opinions entertained successively by the master, by my Brother Pollock, and by the Divisional Court, but I entertain myself a very strong opinion the other way. At first I found great difficulty in construing s. 36 of the County Court Act, 1856, but I now think the section to be quite intelligible. By s. 35 provision is made for the taxation of costs between solicitor and client. This is very

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registrar may allow any costs or charges not exceeding the amount which may have been so agreed to be paid."

By s. 91 of 9 & 10 Vict. 95 (the County Court Act, 1846), it is enacted that "no attorney shall be entitled . . . to recover more than ten shillings for his fees and costs, unless the debt or damage claimed shall be more than five pounds, or more than fifteen shillings in any case within the summary jurisdiction given by this Act; and in no case shall any fee exceeding one pound three shillings and sixpence be allowed for employing a barrister as counsel in the cause . . ."

necessary, looking to the many cases in which either a plaintiff should not succeed, or though succeeding should fail to recover costs from the other side.

Then s. 36 further deals with the subject-matter of s. 35, as follows: [The learned Lord Justice read the section.] It is clear that these words cannot apply to an action in a superior Court. They provide for a taxation by the registrar, and the registrar has no power to tax costs in such an action.

BAGGALLAY, L.J. I am of opinion that this taxation ought to be reviewed, because there has not yet been a taxation on any proper principle. The master has taken a wrong view of the section, which, occurring as it does in an Act which from its title, preamble, and general contents, deals with county court actions, applies to such actions only, inasmuch as it does not expressly provide otherwise.

BRETT, L.J. This action being in the High Court, the master would tax the costs on the High Court scale unless it should be provided otherwise. It is said that s. 36 of the County Court Act, 1856, provides otherwise, but I am clearly of opinion that it does not. This is shewn by the later part of the section, which provides that the taxation shall be conducted by the registrar. It seems that the section deals with claims below 20*l.* only, leaving untouched both claims between 20*l.* and 50*l.* which are within the jurisdiction of the county court, and claims for more than 50*l.*, which are beyond that jurisdiction.

Appeal allowed.

Solicitors for Mary Drew: *Peckham, Maitland, & Peckham.*
A. E. Copp, in Person.

1881 THE GUARDIANS OF THE FULHAM UNION, APPELLANTS; THE GUARDIANS OF THE ISLE OF THANET UNION, RESPONDENTS.

Feb. 23.

Q. B. D. *Poor Law—Settlement by Residence—Penitentiary—"Bonâ fide Charitable Gift"—9 & 10 Vict. c* 66, *s.* 1; 39 & 40 *Vict. c.* 61, *s.* 34.

10QBD173. 174-5,

The pauper resided for upwards of three years in a building in the parish of F., occupied as a home or reformatory for women. This home was supported by money collected at church offertories without the parish, and by annual subscriptions and donations from persons resident in all parts of the kingdom, the money being applied in providing for the supervision, instruction, maintenance, and clothing of the inmates. The pauper during the whole term paid no money for her maintenance and clothing:—

Held, that her maintenance in the home was a "bonâ fide charitable gift" within the meaning of the exception to the proviso in 9 & 10 Vict. c. 66, s. 1, and that she was irremovable from and settled within the parish under 39 & 40 Vict. c, 61, s. 34.

Affirmed in appl. 10 B.D. 529 ca

CASE stated under 12 & 13 Vict. c. 45. s. 11.

On the 9th of August, 1880, an order was made by two justices for Kent, adjudging the last legal settlement of Sarah Horsnaill, a pauper lunatic, to be in the parish of Fulham, in the appellant union, upon the ground that she had resided at St. James's Home, in Fulham, in the capacity of a domestic servant or laundry maid for upwards of three years, and thereby acquired a settlement in the union.

St. James's Home, in which the pauper lunatic resided as above stated, was established at Whetstone, in 1856, with the view of receiving female penitents, chiefly of a higher class than that which supplies most other penitentiaries. In 1871 a building was erected by the society, and has been occupied ever since as a home or reformatory for women.

St. James's Home is supported by moneys collected at church offertories throughout Middlesex, and by annual subscriptions and donations from various persons resident in all parts of the kingdom. The moneys are applied in providing for the supervision, instruction, maintenance, and clothing of the inmates.

Young girls and women are admitted as penitents to the home from all parts of the kingdom upon application to the sister superior in charge. Some are admitted quite destitute and without a change of clothing, in many instances the clothing

has to be destroyed—no regulation exists as to the necessity of a change of clothing being brought by each penitent prior to being admitted to the home. Such penitents for the most part consist of young girls who have lost their characters through various causes, and seek a refuge in this or some similar institution for the purpose of obtaining a reference upon which they may obtain other situations, &c., and the principal conditions upon which they are admitted to the home, are that there are good grounds for believing each applicant to come to the home as a house of penitence, the object of which has been previously explained.

The penitents or inmates of the home are instructed in various domestic duties, and, according to circumstances or capacity, are sent out to situations or service, back to their parents, and to other homes, &c. A uniform style of dress provided out of the funds of the home is supplied to each person admitted, and no other than the prescribed clothing is permitted to be worn therein.

The usual period for which penitents in the home are required to submit themselves for supervision, &c., is two years, but they can leave at any time, and if refractory, may be peremptorily dismissed and sent back to their parents or to the place whence they were originally admitted. If, however, the penitent leaves, or is discharged before the end of the prescribed probationary period of two years, then she leaves without a character being given to her or without the usual outfit of clothing being supplied. No holidays are allowed during the probationary term of two years' residence, nor are the inmates allowed to pass beyond the limits of the home until their time has expired.

Sarah Horsnaill was admitted to St. James's Home in a state of destitution on the 28th of February, 1876, as a penitent on the above conditions.

After remaining on the books of the home for a period of two years, during which time she was instructed and acted in various menial capacities as ordered by the sister superior, her name was removed from the register of admission and discharges shewing the list of penitents from time to time in the home, and as her time for probation had expired, and on account of her satisfactory

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conduct as a penitent, she was placed by the sister superior in a subordinate office. No money was paid either by the pauper lunatic or any other person for her maintenance, clothing, &c., either on her admission to or at any time during her residence in the home, nor did she ever receive any sums of money by way of wages for any services rendered by her therein.

The question for the opinion of the Court was whether the order was right.

Charles, Q.C. (*Poland*, with him), for the appellants. The pauper's residence in the home is not sufficient to make her irremovable from and settled in Fulham under 9 & 10 Vict. c. 66, s. 1 (1), and 39 & 40 Vict. c. 61, s. 34. The contributions to the home are rates or subscriptions raised outside the parish, and are not "a bonâ fide charitable gift." They are not for the benefit of the particular pauper, but for the whole institution. The cases in which a period of residence is excluded from the operation of the section are those of prisoners in prison, inmates of lunatic asylums, and patients in hospitals, shewing that the object is to prevent the settlement in the parish of a class who have a natural tendency to become paupers. The present case is within the mischief of the proviso, and the words "rate or subscription raised in a parish in which the pauper does not reside" distinctly apply to it, unless the word "subscription" is to be rejected altogether. A charitable gift implies an ordinary gift of money to an individual pauper, where there is a donor and donee, but it was not meant that a collection of paupers should be maintained in a parish without its consent until they acquired a settlement there.

(1) By 9 & 10 Vict. c. 66, s. 1, no person shall be removed from any parish in which he shall have resided for five years (the period of residence being reduced by 24 & 25 Vict. c. 35, s. 1, and 28 & 29 Vict. c. 79, s. 8, to one year): Provided always, that the time during which such person shall be a prisoner in a prison, or shall be serving as a soldier, marine, or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed or hospital registered for the reception of lunatics, or as a patient in a hospital, or during which any such person shall receive relief from any parish, or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a bonâ fide charitable gift, shall for all purposes be excluded in the computation of time hereinbefore mentioned.

Prosser, for the respondents. If the construction which has been suggested were adopted, there never could be a "charitable gift" within the exception to the proviso where the money was paid through a treasurer, and the ultimate recipients were unknown to the donor. In the description "rate or subscription raised in a parish," the word "subscription" is probably intended to be ejusdem generis with rate. It cannot be denied that the home is, in ordinary phraseology, in receipt of charitable gifts.

Charles, Q.C., in reply. The legislature could not have contemplated that the whole of the inmates in this home should acquire a settlement in the parish.

FIELD, J. I think the order of the justices was right. The pauper has resided in Fulham for a period sufficient to make her irremovable from it under 9 & 10 Vict. c. 66, s. 1, and 39 & 40 Vict. c. 61, s. 34, unless her residence is within the operation of the proviso of s. 1. The policy of the Act was no doubt to prevent the disruption of families and also to diminish the expense caused by orders of removal. But the proviso is meant to protect parishes from being saddled with the maintenance of paupers whose residence is only temporary, and certain descriptions of residence are exempted from the operation of the section, as also cases where the pauper is, during residence, in receipt of relief from, or is maintained by a rate or subscription raised in, a parish other that in which he resides "not being a bonâ fide charitable gift." So that the question in this case is, was the pauper, during her residence in Fulham, maintained by a subscription raised in some other parish being a "bonâ fide charitable gift?" Now if the legislature had simply meant to provide against the consequences of the temporary residence of a large number of persons in a parish, I do not see why they should not have provided against a case like the present, where the burden thrown upon the rates is so disproportionate. It may, however, be said that the parish benefits by the rate imposed on the building occupied by the home, and that the case is not like the inmates of a prison, where the building contributes nothing to the rates. But we must not speculate upon what the legislature might have said if they had contemplated the present case, we

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must confine ourselves to the words of the proviso; and looking to the principle involved and the language used, I think the residence of the pauper in the present case is within the exception, and that the subscription by which the pauper was maintained, though "raised" outside the parish, was a "bonâ fide charitable gift." It has been urged that the word "gift" implies both a personal donor and donee, and that the money must be money which is raised for the benefit of the pauper exclusively. But in the present case the money is indirectly given to the pauper through the medium of the officers of the institution, and though by no means clear as to the exact meaning of the proviso, I think that the present case comes within the exception in the proviso, and that the order must be affirmed.

MANISTY, J. I am of the same opinion. I am very much disposed to think that the proviso was drawn so as to exclude cases where a rate or subscription was raised in one parish for the maintenance of paupers in another, and that the exception "not being a bonâ fide charitable gift," meant that the gift was not with the bonâ fide view of maintaining the pauper, but with the intention of settling her in another parish.

Judgment for the respondents; Leave to appeal granted.

Solicitors for appellants: *Rexworthy, Oswell, & Co.*
Solicitors for respondents: *Paterson, Snow, & Bloxam.*

COLEMAN, APPELLANT; THE OVERSEERS OF BIRMINGHAM, RESPONDENTS.

1881
March 5.

Q. B. D.

Poor Law—Maintenance by Relations—Grandmother—Married Woman with Separate Estate—43 Eliz. c. 2, s. 7—Married Women's Property Act (33 & 34 Vict. c. 93), s. 14.

A woman whose husband is alive is not liable under the Poor Law Acts to contribute to the support of her grandchildren, even though she has separate estate and is able, independently of her husband, to support them.

CASE stated by justices for Birmingham under 20 & 21 Vict. c. 43.

Upon the hearing of a complaint—preferred by the respondents against the appellant under s. 26 of 59 Geo. 3, c. 12, amending 43 Eliz. c. 2, and 4 & 5 Wm. 4, c. 76, s. 56—to the effect that Margaret Caddick on the 1st of August, 1880, and from thence until the time of the complaint had been and still was residing in and actually chargeable to the parish of Birmingham, and was likely so to continue, and that she during all the time aforesaid had been and still was a poor and impotent person, and not able to work or maintain herself and was likely so to continue, and that the appellant was the grandmother of, and of sufficient ability at her own charges to relieve and maintain, the said Margaret Caddick, the justices made an order on the appellant for the payment of 3*s.* 6*d.* weekly.

It appeared that Margaret Caddick was chargeable to the parish, and that the appellant was her grandmother, having a separate estate and being of sufficient ability, at her own charges and independently of her present husband, to maintain and support her grandchild, and that the appellant was at the date when Margaret Caddick became chargeable and still was the wife of John Coleman.

It was contended on behalf of the appellant that her husband being alive, she was not liable during her present coverture to pay or contribute towards the maintenance of her grandchildren, and on the part of the respondents that under 33 & 34 Vict. c. 93, s. 14, a married woman having a separate estate is subject to the same liability for the maintainance of her children as a widow, and that

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in this respect the terms child or children used in the statute must exnecessitate be considered synonymous with the term issue, and therefore comprehend grandchildren, and the cases of *Radcliffe* v. *Buckley* (1) and *Orford* v. *Churchill* (2) were cited in support of this contention, and also *Rex* v. *Cornish*. (3)

The justices made the order before mentioned, and the question for the opinion of the Court was whether this order was right.

Bosanquet, for the appellant. The order cannot be supported. An order of maintenance under 43 Eliz. c. 2 (4) may be made upon a grandmother; but in *Custodes* v. *Jinks* (5), where the grandmother had married a second husband, the order was quashed, Rolle, C.J., saying that a feme covert could not be charged, but that her husband was liable. And in *Draper* v. *Glenfield* (6) the question arose whether the second husband of a grandmother could be liable, and it was thought that, if she was of ability when he married, he was liable, but not otherwise. The Married Women's Property Act, s. 14, contains nothing to support the order, but may be relied on by the appellant, as it makes a married woman with separate property liable, equally with the widow, for the maintenance of her children, shewing that the law was supposed to be otherwise at the date of the Act.

[He was stopped.]

(1) 10 Ves. 195.

(2) 3 V. & B. 59.

(3) 2 B. & Ad. 498.

(4) By 43 Eliz. c. 2, s. 7, the father and grandfather, and the mother and grandmother, and the children of every poor and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their own charges relieve and maintain every such poor person in that manner and according to that rate as by justices shall be assessed, &c.

By the Married Women's Property Act (33 & 34 Vict. c. 93), s. 13: Where, in England, the husband of any woman having separate property becomes chargeable to any union or parish, the justices in petty sessions may make an order against her for his maintenance, as under the Poor Law Amendment Act, 1868, s. 33, they may make against a husband for the maintenance of his wife.

By s. 14: A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: Provided that nothing in the Act shall relieve her husband from any liability at present imposed upon him by law to maintain her children.

(5) Sty. 283.

(6) 2 Bul. 345.

Dugdale, for the respondents. Apart from the cases which have been relied upon, the appellant, as grandmother of the pauper, is liable for her maintenance under 43 Eliz. c. 2. And the cases are not inconsistent with her liability, for their ratio decidendi is that a married woman is not of ability to support her relations, all her property having passed to her husband. In *Cooper* v. *Martin* (1), where *Custodes* v. *Jinks* (2) and *Draper* v. *Glenfield* (3) are discussed, Lawrence, J., says: "The wants of the children are only a ground for an order of maintenance upon the parent, if of sufficient ability. But when she has parted with that ability by her marriage, she is no longer liable." Here the appellant has separate estate apart from the control of her husband. The respondents do not rely upon s. 14 of the Married Women's Property Act, or contend that the word "children" in that section includes "grandchildren." This Act was not intended to affect the maintenance of pauper children, or to affect a married woman's liability under the Statute of Elizabeth. It is true that no case can be found where an order has been made upon a married woman with separate property, but the Court will not extend an exemption from liability beyond the reasons upon which it is based.

Bosanquet, in reply. The practice of settling property to the separate use of married women existed at the time when the cases referred to were decided, and yet it was not suggested that separate property affected a married woman's liability under the statute. With regard to the Married Women's Property Act, s. 13 shews that it was intended to apply to the poor law; and if the respondents' contention is right, s. 14 is useless and unnecessary.

FIELD, J. I am of opinion that our judgment ought to be for the appellant. The question for our determination is whether the order of the justices for the maintenance by the appellant of her grandchild was correct in law. It appears that the appellant, though a married woman, had separate estate and was of sufficient ability to maintain the pauper. I was at first inclined to think that the order might stand, but upon consideration I am clearly

(1) 4 East, 76. (2) Sty. 283.

(3) 2 Bul. 345.

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of a different opinion. In support of the order it was argued that the appellant was literally within 43 Eliz. c. 2, s. 7, being the grandmother of the pauper and of sufficient ability to maintain her. Then the question arises, did the statute intend the word "grandmother" to apply to a woman under coverture? Did the Act mean that the female children of a pauper should, while they were under coverture, be liable to be ordered to maintain their parents? We were referred to a case of *Custodes* v. *Jinks* (1), where Rolle, C.J., held that a woman under coverture was not liable. This case seems, ever since, to have been regarded as good law, and has never been qualified, though Acts have been passed since the statute of Elizabeth for the purpose of extending the remedies against persons liable for the maintenance of their relations. The principle of the case was of course that the wife became one person with her husband, and in another case it was thought that the man who married the grandmother was liable to maintain her grandchildren if he received a sufficient portion with her, a decision which I find it hard to understand. We are asked to support an order like the one which was quashed in *Custodes* v. *Jinks* (1), and that I think we cannot do, but must follow that case.

It was contended at the hearing of the summons that, inasmuch as the Married Women's Property Act (33 & 34 Vict. c. 93), s. 14, enacts that a married woman with separate estate shall be subjected to the same liability for the maintenance of her children as a widow, the term "children" must comprehend "grandchildren." The justices appear to have adopted this construction, having been probably misled by some cases upon the construction of wills which were cited to them. But on the present occasion this contention has been abandoned by the respondents, and they urge that the appellant is liable under the statute of Elizabeth. On the other hand, we cannot find that it has ever been held that a married woman with separate estate is liable to be ordered to maintain her children, and if there were any such liability I should have expected the Married Women's Property Act to have noticed it. But it seems to me that this Act intended to create an entirely new liability—the liability of a married woman with

(1) Sty. 283.

separate estate to support her children—and did not mean to go further.

MANISTY, J. I am of the same opinion. We have a decision more than 200 years old that a woman under coverture cannot be made liable under 43 Eliz. c. 2, s. 7, to maintain her grandchildren; and down to the passing of the Married Women's Property Act (33 & 34 Vict. c. 93), this decision had not been overruled. Unless some statute has altered the law, I think we must follow a decision which has been submitted to for so long a time. Sect. 13 of the Married Women's Property Act has an express provision for making a married woman with separate property liable to the parish for the maintenance of her husband, and this, so far as I can see, was the first instance of a woman whose husband is living being made liable under the Poor Law Acts. Then s. 14 enacts that a married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children. Going back to the statute of Elizabeth we find it enacting that the mother and grandmother and the children of every poor person unable to work, being of sufficient ability, shall maintain such poor person, but these words must be read as if the description were "mother and grandmother not being under coverture." If, therefore, we extended the operation of s. 14 to a grandmother we should be adding to the section and taking upon ourselves the functions of the legislature.

Judgment for the appellant.

Solicitors for appellant: *Robinson, Preston, and Snow, for Rowlands, Bagnall, & Co., Birmingham.*

Solicitor for respondents: *Walter Bowen.*

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PAYNE *v.* FERN.

Feb. 23.

Q. B. D.

Bill of Sale—Proviso for Possession by Mortgagor—Sale by Mortgagor to Third Person—Conversion.

In consideration of a loan of money, G. [the mortgagor] by bill of sale conveyed his furniture, stock-in-trade, and other effects in and upon the farmhouse occupied by him, to the plaintiff, and all things of the like nature which might at any time during the continuance of the security be brought on the premises. The bill of sale contained provisoes that if the mortgagor should upon demand delivered to him or his assigns pay the amount secured the security should be void, and that in case he should make default in payment of the amount, or in case he should assign the goods or permit them to be removed from the premises before such payment, it should be lawful for the plaintiff to enter upon the premises and take possession of and sell the goods assigned. There was a further proviso that until the mortgagor or his assigns should make default, or do any act whereby the power of entry might be put in force, it should be lawful for him or his assigns to hold and possess the goods assigned. The mortgagor, while part of the consideration money remained unpaid, sold and delivered off his premises to the defendant part of the goods assigned. The plaintiff thereupon demanded these goods from the defendant, and upon his refusal to give them up, brought an action for their conversion. At the trial the jury found that the sale to the defendant was not in the ordinary course of business:—

Held, that the defendant was liable, for upon the true construction of the bill of sale the sale and removal of the goods gave no title to the defendant as against the plaintiff.

Action for the conversion of live stock and goods assigned to the plaintiff by bill of sale.

At the trial, before Watkin Williams, J., at the Gloucestershire winter assizes, 1881, it appeared that in February, 1880, one Griffin executed the bill of sale to secure the payment of 26*l.* by him to the plaintiff. The bill of sale conveyed the furniture, stock-in-trade, and other effects in and upon the farmhouse occupied by Griffin, to the plaintiff, and all things of the like nature which might at any time during the continuance of the security be brought on the premises. It contained provisoes that in case the mortgagor should on demand to him or his assigns pay the 26*l.* the deed should be absolutely void; and that in case the mortgagor should make default in payment of the said sum, or in case he should assign the said goods, &c., or remove, or permit them to be removed, before the money thereby secured should be fully paid, it should be lawful for the plaintiff to enter

the mortgagor's premises and take and keep possession of the goods assigned and sell and dispose of them, and that until the mortgagor or his assigns should make any default or do any act whereby the power of entry might be put in force, it should be lawful for him and his assigns to hold and possess the goods assigned. Part of the consideration money was paid by Griffin, but in August, 1880, 14*l.* remained due, and in that month Griffin sold and delivered off his premises to the defendant the cattle, goods, and chattels for 90*l.*, which was paid or settled in account. Upon hearing of this transaction, the plaintiff demanded the goods from the defendant, and upon his refusal to give them up brought this action. The learned judge directed the jury to find for the plaintiff if they thought that the sale to the defendant was not a sale in the ordinary course of business. The jury found a verdict for the plaintiff.

Bosanquet, moved for a new trial, on the ground of misdirection. The articles assigned by the bill of sale are not enumerated in any schedule, and it repeatedly refers to "assigns" of the mortgagor. It is also stipulated that until default the mortgagor is to be allowed to have the enjoyment of his property. The object of the parties must therefore be taken to have been that the bill of sale should operate as a floating security, giving the mortgagee full power upon default to enter and take possession of such property as he might find on the mortgagor's premises, but not restraining the mortgagor from assigning the farming stock to a purchaser like the defendant.

FIELD, J. I think the decision of my Brother Williams was quite right and in accordance with the *National Mercantile Bank* v. *Hampson* (1) and *Taylor* v. *McKeand*. (2) The bill of sale operates as an absolute conveyance of the property on the mortgagor's premises, subject to the condition that the conveyance may be defeated on payment of the amount due by the mortgagor. With regard to such part of that property as consists of stock-in-trade, it may be, that according to the cases cited, there is an implied condition that the grantor shall be at liberty

(1) 5 Q. B. D. 177. (2) 5 C. P. D. 358.

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to deal with it in the ordinary course of his business. But the jury have found that the sale to the defendant was not in the ordinary course of business, and the plaintiff had therefore a right to demand that the defendant should give up the goods and, upon his refusal, to bring this action. The plaintiff had under the circumstances both the property in and a right to the possession of the goods. The question involves no difficulty, and I have had to decide it before.

MANISTY, J., concurred.

Rule refused.

Solicitors for defendant: *Chester & Co., for Cooper & Chawner, Uttoxeter.*

April 7.

CLOVER *v.* ADAMS AND OTHERS.

Q. B. D.

*Practice—Solicitor and Client—Lien for Costs—Charging Order—"Property recovered or preserved"—Jurisdiction of Judge at Chambers—*23 *&* 24 *Vict. c.* 127, *s.* 28—*Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 39.

19 QBD 313.

Not followed. WIMBOURNE *v.* FINE [1952] 1 Ch. 869

The defendant having paid money into court in the action, the plaintiff's solicitor declined to proceed with the action, except on terms to which the plaintiff would not assent. Thereupon the plaintiff retained fresh solicitors and obtained an order for a change of solicitors. After the order was made the late solicitor obtained a judge's order at chambers charging the money in court with his costs in the action:—

Held, by Grove and Lindley, JJ., 1, that when an action is pending a judge at chambers has jurisdiction to make such an order; 2, that the money in court was "property recovered or preserved" within 23 & 24 Vict. c. 127, s. 28; 3, that the order was valid though the plaintiff's solicitor had ceased to be such when it was made; 4, that though he had discharged himself from the position of plaintiff's solicitor, yet as he had not done so wrongfully or improperly the order was right.

MOTION to rescind an order of Cave, J., at chambers, dated the 31st of March, 1881.

In this action, which was for trespass and negligence, the defendants paid 25*l.* into court. The plaintiff's then solicitor, Day (as the plaintiff asserted but Day denied), asked the plaintiff for authority to take the money out of court or for funds to go on with the action, and on the plaintiff's refusal to take either course, Day declined to proceed further. The plaintiff then

retained Michlethwait & Co. as his solicitors, and obtained an order at chambers for a change of solicitors. An order having been made to dismiss the action, unless an affidavit of documents were made by the plaintiff, Micklethwait & Co. asked Day to deliver up to them the papers in the action, which he declined to do. Cave, J., made an order requiring Day to deliver up to Micklethwait & Co. the proceedings and papers in the cause on their undertaking to hold them subject to Day's claim for costs, and at the same time made the order now appealed from, that Day should have a charge upon the 25*l.* in court for his costs, charges, and expenses of and in reference to the action, and that in the meantime such sum should stand so charged accordingly.

Underhill, Q.C., for the plaintiff, in support of the motion. The order which was made under 23 & 24 Vict. c. 127, s. 28 (1), is bad on four grounds. 1. A judge at chambers has no power to make such an order. If the action has been heard it can be made only by the judge who hears; if not heard by the Court in Banc only: *Higgs* v. *Schrader* (2); *Catlow* v. *Catlow.* (3) 2. The 25*l.* in Court is not "recovered or preserved" within s. 28. "Recovered" means

(1) 23 & 24 Vict. c. 127, s. 28: In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved; and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a 'bonâ fide' purchaser for value without notice, be absolutely void and of no effect as against such charge or right: Provided always, that no such order shall be made by any such Court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations.

(2) 3 C. P. D. 252.

(3) 2 C. P. D. 362.

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recovered by judgment or something equivalent. If the plaintiff accepted the money in satisfaction it might be "property recovered," but he has not and never may. 3. When the order appealed from was made Day was not the plaintiff's solicitor, and s. 28 contemplates the order being made in favour of a person who is the solicitor at the time. 4. Day having discharged himself wrongfully and improperly from the action has no claim upon the 25*l.* and no ground for asking the favour of the Court, the matter being entirely in their discretion: *Cresswell* v. *Byron* (1); 1 Archbold's Pract. 13th ed. p. 93.

Crispe, for Day, contended that the order was valid, and that s. 39 of the Judicature Act, 1873 (36 & 37 Vict. c. 66) gave a judge at chambers jurisdiction to make all orders which could be made by a Court in Banc, and referred to the general practice.

[He was then stopped.]

GROVE, J. I think the order was right. On the first point I have had some doubt, and still think the matter not wholly free from doubt, but I do not differ from my Brother Lindley, who entertains a stronger opinion than I do on that point. On the whole, I think that the words "the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending," include any judge exercising jurisdiction on the subject, and therefore a judge at chambers. The Court or judge must be a Court or a judge to whom the cause is assigned or who are seised of the record. By the operation of the Judicature Act, 1873, s. 39, a judge at chambers has the jurisdiction of the High Court generally and represents all the courts, and is therefore a judge "before whom the suit is depending."

The other points are, I think, tolerably clear. The solicitor must be one who is "employed to prosecute or defend any suit," &c. Those words do not import that the solicitor must be the solicitor at the time when he makes the application. The words "shall be employed" are not used in the future tense; the use is conditional; they do not tie one down to any particular time. If indeed at the time the money was paid into court he was not the solicitor, there might be a strong and perhaps a conclusive

(1) 14 Ves. 271.

argument against him, but here the applicant was the solicitor at the time the money was paid into court. Then, as to the words "the property recovered or preserved," I think it is either recovered or preserved. "Recovered" is the better word to describe the present case. The money is not in hand, but it is as much recovered as if there had been a judgment, for the plaintiff could get it whenever he pleased. If, however, it is not "recovered," I think it is "preserved" for recovery.

As to the last point, there is nothing in the affidavits to shew that the solicitor wrongfully discharged himself. He denies that he discharged himself for any wrong cause, and there is nothing to shew that he did. Then if he discharged himself rightfully I see no reason why he should not be entitled to the order.

LINDLEY, J. The language of s. 28, "the Court or judge before whom any such suit has been heard or shall be depending" points to the application being made upon an interlocutory order before the final hearing of the cause. The present application, therefore, is not premature. Then is the money paid into court "property recovered or preserved?" I think it is "recovered." The plaintiff can have it for the asking. True it is not in his pocket, for if it were this application would not be made; but it is the next thing to being in his pocket.

Next it is said the application ought to have been made to the Court in Banc. The action has never been tried, and therefore there is no question as to the particular judge before whom the "suit has been heard." The action is still depending, and the question is only between the judge at chambers and the Court in Banc. The judge at chambers has power to act for the Court generally, unless there are any words to deprive him of it, and here there is nothing to oust his jurisdiction. The practice is to make these orders at chambers, and I have made a great many at chambers, but the question of jurisdiction was never raised before me. The latest rules on the subject (Rules of the Supreme Court, April, 1880) also recognise the jurisdiction by the words of Form H. 27, "Charging order, solicitor's costs, judge in chambers," and then follows a form of "charging order" in favour of the solicitor for his costs.

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As to the rest, I agree with my Brother Grove for the reasons he has given. There is nothing to shew that the solicitor discharged himself from the case improperly.

Motion refused.

Solicitors for plaintiff: *Micklethwait & Co.*
Day in Person.

April 12.

EX. D.

NATIONAL PROVINCIAL BANK OF ENGLAND *v.* HARLE AND OTHERS.

Assignment of Debt—Mortgage—Charge—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

By a mortgage deed in 1877 premises were assigned to secure repayment of 1380*l.* due from the mortgagor to the mortgagee with interest, and the mortgagor covenanted to pay debt and interest six months thence. The mortgagee in 1878 deposited the deed with his bankers as security for the balance of his banking account, and by deed in 1879 assigned and transferred to them the sum of 1380*l.* due on the mortgage deed, and all interest thenceforth to become due, and all securities for principal and interest and all benefit and advantage thereof, and all his right, title, interest, and property therein to secure repayment to the bankers of 939*l.* then due to them on his banking account, and any further sum not exceeding 1200*l.* which might thereafter become due to them from him, with a proviso for reconveyance of the premises if the assignor should on a day named pay them back the 939*l.* and any further sum not exceeding 1200*l.* which might be due, with interest. The bank having given notice in writing of this assignment to the mortgagor sued him for 984*l.* then due on the assignor's banking account:—

Held, by Pollock, B., that the assignment to the bank by the deed of 1879 was not an "absolute assignment (not purporting to be by way of charge only)" within the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6, and that the action could not be maintained.

DEMURRER to part of the statement of defence of the defendant Peter Harris. The material part of the statement of claim is fully set out in the judgment. The defence raised questions which were discussed in argument but not decided, and is therefore omitted here. The judgment being that the statement of claim was bad, it became unnecessary to decide the demurrer to the defence. The other defendants did not defend.

March 2. *Wills, Q.C.* (*Alderson Foote*, with him), for the plaintiffs. This is an "absolute assignment not purporting to be by way of charge only" within s. 25, sub-s. 6 of the Judicature

Act, 1873. (1) That it is by way of mortgage does not prevent its being absolute, for "absolute" in s. 25 means that it must not be conditional, not that it must not be defeasible on repayment. An assignment by way of mortgage gives an absolute right to sue, and though there is here a proviso for reassignment of the premises there is none for reassignment of the debt. The section says it must not be "by way of charge only," but says nothing about mortgage. A "charge" designates only a particular fund, and is a mere appropriation not passing the property. "Charge" is distinguished from equitable assignment in 1 Fisher on Mortgage, 3rd ed. p. 77, s. 105, 106.

Cave, Q.C. (*Dugdale*, with him), for the defendant. The section is aimed at out and out sales and assignments and not at mortgages, upon which an account must always be taken. The assignment was subject to the right of the assignor to have an account, and the premises must be reconveyed when the debt which must not exceed 1200*l.* (less than the sum secured by the first mortgage) was paid off. The plaintiffs might have sued in the assignor's name: *Hammond* v. *Messenger* (2) and the notes to *Ryall* v. *Rowles* 2 Wh. & T. L. C. 779.

Wills, Q.C., in reply. Neither an equitable right of redemption nor a liability to account prevents an assurance from being absolute: 1 Fisher on Mortgage, 3rd ed. p. 3.

Cur. adv. vult.

(1) Sub-s. 6: Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees.

(2) 9 Sim. 327.

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April 12. POLLOCK, B., after observing that as the statement of claim was bad it became unnecessary to give any decision upon the demurrer to the defence, read the following judgment:—

In this case there was a demurrer by the plaintiffs to the statement of defence of the defendant Harris, who had pleaded separately. Upon the argument of this demurrer, however, an objection was taken by counsel for Harris to the plaintiffs' statement of claim, which it was alleged disclosed no legal cause of action.

The facts as they appeared upon the plaintiffs' statement of claim are as follows: The plaintiffs are bankers at Leeds, and Johnson Harle, who was one of the defendants in this action, on the 14th of September, 1878, deposited with them as security for the balance of a banking account an indenture of mortgage. This mortgage, which was dated the 29th of June, 1877, was made between the defendants John Hall and Peter Harris, of the first part, and the defendant Johnson Harle, of the second part, and the effect of it was as follows:—

The defendants John Hall and Peter Harris granted and assigned to the defendant Johnson Harle certain premises therein described by way of mortgage, and (subject to a prior mortgage therein recited) to secure the repayment to Johnson Harle of the sum of 1380*l.*, with interest thereon at 5 per cent. per annum, then due and owing from John Hall and Peter Harris to Johnson Harle, they, John Hall and Peter Harris, for themselves, their heirs, executors, and administrators, covenanted with Johnson Harle, his executors, administrators, and assigns that they, John Hall and Peter Harris, or the survivor of them, or the heirs, executors, or administrators of such survivor, their or his assigns, would, on the 29th day of December, 1877, pay or cause to be paid to Johnson Harle, his executors, administrators, and assigns, the sum of 1380*l.*, together with interest thereon at the rate mentioned from the 28th of June, 1877, and would further pay interest at the rate of 5 per cent. per annum upon so much of the principal sum of 1380*l.* as should remain unpaid after the 29th of December, 1877, until the principal sum should be paid off and discharged.

On the 30th of October, 1879, the defendant Johnson Harle

was indebted to the plaintiffs in respect of his banking account in the sum of 939*l.* 9*s.* 3*d.*, and thereupon, by an indenure bearing date the 30th of October (to which the plaintiffs by their statement of claim refer), Johnson Harle assigned and transferred to the plaintiffs all the principal sum of 1380*l.* due and owing on the security of the indenture, mentioned in the second paragraph of the statement of claim, and the interest thenceforth to become due for the same, and all securities for the principal sum and interest, and all benefit and advantage thereof, and all right, title, interest, and property of Johnson Harle therein, to secure the repayment to the plaintiffs by Johnson Harle of the sum of 939*l.* 9*s.* 3*d.*, and any further sum, not exceeding in the whole 1200*l.*, which might thereafter become due and owing from Johnson Harle to the plaintiffs.

On the 9th of December, 1879, by a further indenture of that date made between Johnson Harle, of the one part, and the plaintiffs, of the other part, and indorsed upon the indenture of the 30th of October (to which the plaintiffs by their statement of claim referred) it was agreed and declared (amongst other things) that the indenture of the 30th of October should constitute and be a continuing security to the plaintiffs, notwithstanding any settlement of account or any other matter or thing whatsoever, and should be in addition to, and should not operate so as to prejudice, any other securities then or thereafter held by the plaintiffs in respect of the moneys intended to be secured.

On the 31st of October, 1879, express notice in writing of the assignment was given to the defendants John Hall and Peter Harris. The statement of claim further alleged that there is now due and owing from the defendant Johnson Harle to the plaintiffs in respect of his current account the sum of 984*l.* 19*s.* 11*d.*

Upon this state of facts it was contended, on behalf of the plaintiffs, that the effect of the deed of the 30th of October, 1879, was to create an absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of a debt to the plaintiffs, within the meaning of s. 25, sub-s. 6 of the Judicature Act, 1873 ; and that, as express notice in writing had been given to the defendants Hall and Harris, it must be deemed to be effectual in law to pass and transfer the legal right to the

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debt from the date of such notice, and all legal and other remedies for the same within the meaning of that sub-section. In the course of the argument it was agreed that I should refer to the assignment itself, as if it had been set out in full in the statement of claim. The contention on the part of the defendants was that the assignment was not an absolute assignment within the meaning of the statute, but that it was an assignment which purported to be by way of charge only; and it was pointed out that the debt assigned amounted to 1380*l.*, whereas the debt due from Harle to the bank at the date of the assignment was only 939*l.* 9*s.* 3*d.*, and the further advance, which was contemplated and which it was agreed should be secured by the assignment, did not exceed in the whole 1200*l.*

Although the terms used in the sub-section referred to are not new, the effect given to such an assignment of transferring the legal right to a debt is new, and, as far as I can discover, this is the first time that any Court has been called upon to put a construction upon this provision. Looking, however, to the language used and to the well-known principles by which the Courts have been guided when dealing with the assignment of a security by way of mortgage, I have come to the conclusion that the assignment in question is not one that is within the scope of the statute. The words employed are both affirmative and negative. The assignment must be "absolute," and it must not "purport to be by way of charge only." In so far as the premises under mortgage are concerned, the legal estate in them is no doubt conveyed to the plaintiffs by language as full and complete as if the defendants had been purchasers out and out; but in Equity it has long been established that the substance of the transaction must be looked to, to see what is its effect, and hence the mortgage debt has always been treated as the principal and the land as the accessory, and it is the assignment of a debt which is dealt with by the statute.

One matter with reference to the language of the sub-section ought, perhaps, to be further mentioned, namely, what is the meaning of the words "purporting to be by way of charge only?" Do they mean an assignment which expresses on the face of it that it is made "by way of charge only," or do they mean an

assignment which, coupled with all the surrounding circumstances, shews that it is by way of charge only? Cases may arise which will require a careful consideration of this question. In the present case, however, I do not feel that any great difficulty is presented, because the assignment expressly declares that if the defendant Harle shall pay to the plaintiffs the sum of 939*l.* 9*s.* 3*d.*, which it recites is owing from him to them, and any further sum not exceeding the 1200*l.*, with interest, which may at any time thereafter be due from the defendant to the plaintiffs, the plaintiffs will then reconvey the mortgaged premises to the defendant. This appears to me sufficiently to indicate upon the face of the assignment that it "purports to be by way of charge only," so as to bring it within the exception and prevent it from being an absolute assignment within the meaning of the statute.

In the result, therefore, upon this demurrer, there must be judgment for the defendant, with costs. Leave to apply to myself at chambers as to amendment or entry of judgment.

Judgment for the defendant.

Solicitors for plaintiffs: *Wilde, Berger, Moore, & Wilde, for G. B. & G. H. Nelson, Leeds.*

Solicitors for defendant: *Torr, Janeways, Torr, & Gribble, for A. Hailstone, Bradford.*

WALKER *v.* ROOKE.

April 26.

Q. B. D.

Practice—Attachment of Debts—Garnishee Order—Partnership Firm—Order XLV., rule 2.

A garnishee order cannot be made under Order XLV., rule 2, attaching a debt due from a partnership firm described by its partnership name.

IN this case the plaintiff, who had obtained judgment, had applied ex parte, at chambers, for garnishee orders to attach various debts due to the defendant in execution. Amongst the debts so sought to be attached were certain debts alleged to be due from partnership firms described by their partnership names, without stating the names of the partners. The master refused to make the order in the case of firms so described. On appeal, Bowen, J., affirmed his decision.

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Horne Payne, applied on behalf of the plaintiff, by way of appeal against the decision of the learned judge, for orders attaching these debts. The practice has been different in the different courts prior to the Judicature Act. In the Court of Exchequer garnishee orders have been issued against firms described by their partnership names. It is contended that there is nothing in principle to prevent such an order being made. The partnership name is a name by which the persons composing the partnership are known, and an order may be made to bind those persons by that name. The object is to attach the debts promptly, but it is often impossible to find out the names of the persons composing a firm in the first instance.

[FIELD, J. Upon whom are you to serve the order, and who is to be subject to attachment for non-payment of the debt?]

The order may be served as a writ is served upon a partnership.

[FIELD, J. That is expressly provided for by statute.]

The 3rd rule of Order XLV. provides that service shall be in such manner as the Court or judge shall direct.

[LORD COLERIDGE, C.J. You have to bring your case within the terms of the order. Rule 2 of Order XLV. provides that all debts in which any other person is indebted to the judgment debtor may be attached by an order upon such person. There is no provision for an order upon a firm.]

The whole question seems to be whether the "person" alluded to by the section must be described by his true Christian and surname. At common law a man might be sued by any name by which he was commonly known.

[BOWEN, J. If you are right there was no necessity for all the machinery given under the Judicature Act for suing firms.]

That was necessary because personal service of the writ was necessary by the then existing law.

THE COURT (Lord Coleridge, C.J., Field and Bowen, JJ.) refused the application.

Application refused.

Solicitors for applicant: *S. M. & J. B. Benson.*

[IN THE COURT OF APPEAL.]

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BURNAND AND OTHERS *v.* RODOCANACHI, SON, AND COMPANY.

Marine Insurance—Valued Policies—War—Destruction of Cargo by Enemy—Compensation paid by one Sovereign State to another—Right of Injured Party to Money so paid—Salvage—Indemnity.

The plaintiffs, underwriters, granted to the defendants valued policies of insurance, including war risks, on a cargo of a United States merchant ship. Such cargo during the insured voyage was totally destroyed by the *Alabama*, a cruiser of the Confederate States then at war with the United States of America; and the plaintiffs paid to the defendants, as and for an actual total loss, the amounts named in the policies, but the real value of the cargo exceeded the sum so paid.

The loss of this cargo formed one of the items of claims made by the United States against Great Britain, in respect of the damage done by the *Alabama* and other confederate cruisers, which was referred to arbitration, and resulted in an award under which Great Britain paid the sum awarded for compensation to the United States. Afterwards the United States passed an Act of Congress for constituting a Court for the distribution of this sum amongst its subjects who had been injured and whose claims should be allowed by that Court under the provisions of such Act, by which it was declared in effect that no claim should be allowed for which the party injured had received compensation from any insurer; but that if such compensation should be not equal to the loss actually suffered, allowance might be made for the difference; and that no claim should be allowed by or on behalf of any insurer, either in his own right or of that of the party insured.

The defendants claimed in such Court and received a sum out of such compensation money for so much of their loss as exceeded the sum insured. The plaintiffs, having paid for a total loss, sued the defendants for the compensation-money they had so received:—

Held (Baggallay, L.J., dissenting), that this money was no part of the salvage, but was given to the defendants under the Act of Congress as a pure gift, and that therefore the plaintiffs were not entitled to recover it.

APPEAL by the defendants from the judgment of Lord Coleridge, C.J., in an action tried by him without a jury. (1) The following are the material facts:—

The defendants effected with the plaintiffs, who are underwriters, two valued policies for 7500*l.* each on tobacco valued in the policies at 15,000*l.*, which formed the cargo of the *Lamplighter*, a United States merchant ship, on a voyage from New York to Genoa. The insurance included war risks, and afterwards, during

(1) 5 C. P. D. 424.

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the insured voyage, the cargo was totally destroyed by the *Alabama*, a cruiser of the Confederate States of America, then at war with the United States. The plaintiffs accordingly paid the defendants 15,000*l.*, the sum insured as for a total loss of the said cargo. The actual value of the cargo exceeded such sum by 6557*l.* 7*s.* 3*d.*

The loss of the cargo of the *Lamplighter* formed one of the items of claim made by the United States against Great Britain in respect of the damage done by the *Alabama* and other Confederate cruisers, and which, pursuant to a treaty between the two sovereign states, made at Washington in 1871, was referred to arbitration, which resulted in an award under which Great Britain paid the sum awarded to the United States in satisfaction of such claim.

Afterwards, namely in June, 1874, the United States passed an Act of Congress for constituting a Court for the distribution of such sum amongst the subjects of the United States who had been injured by the Confederate cruisers, and whose claims should be allowed by that Court under the provisions of such Act, amongst which was s. 12, as follows:—"*No claim shall be admissible or allowed by said Court for any loss or damage for or in respect to which the party injured, his assignees, or legal representatives shall have received compensation or indemnity from any insurance company, insurer, or otherwise, but if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference.* And in no case shall any claim be admitted or allowed for or in respect to unearned freights, gross freights, prospective profits, freights, gains, or advantages, or for wages of officers and seamen for a longer time than one year next after the breaking up of a voyage by the acts aforesaid: *And no claim shall be admissible or allowed by the said Court by or on behalf of any insurance company or insurer, either in its or his own right, or as assignee or otherwise in the right of a person or party insured as aforesaid,* unless such claimant shall shew, to the satisfaction of said Court, that during the late rebellion the sum of its or his losses in respect to its or his war risks exceeded the sum of its or his premiums or other gains upon or in respect to such war risks; and, in case of any such allowance, the same shall not be greater than such excess

of loss: and no claim shall be admissible or allowed by said Court arising in favour of any insurance company not lawfully existing at the time of the loss under the laws of some one of the United States: And no claim shall be admissible or allowed by said Court arising in favour of any person not entitled at the time of his loss to the protection of the United States in the premises, nor arising in favour of any person who did not, at all times during the late rebellion, bear true allegiance to the United States."

The defendants claimed in the court so constituted, under the Act of Congress, the difference between the actual value of the said cargo of the *Lamplighter* and the sum so insured, and such claim was allowed, but in consequence of some heavy deductions for commission and expenses in prosecuting and establishing such claim, the actual sum received by the defendants was only 2803*l.* 17*s.* 2*d.*

The plaintiffs alleged that they had, by payment of the total loss under the policies, become subrogated to the position of the defendants, and were therefore entitled to the sum which the defendants had so received from the United States Government.

Lord Coleridge, C.J., gave judgment for the plaintiffs, and from this judgment the defendants appealed.

Sir Henry James, A.G., and *Gathorne Hardy*, for the defendants. The underwriters, although they paid as for a total loss the sum stated in the policies as the value of the cargo, are not entitled to recover the money which the defendants, the assured, afterwards received from the American tribunal. It is not denied, as decided in *North of England Insurance Association* v. *Armstrong* (1), which is relied on by Lord Coleridge, C.J., that as between the underwriters and the assured the value in a valued policy is to be taken to be that which is so stated, and that therefore the underwriters, after they had paid that amount, would be entitled to anything subsequently received by the assured in respect of the subject-matter of the insurance, which would be in the nature of salvage. But here the money which the defendants have received, and which is sought to be recovered in this action, can in no sense be said to have been received in respect of the subject-matter of

(1) Law Rep. 5 Q. B. 244.

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the insurance, so as to be in the nature of salvage. It was paid to the defendants in respect of the actual personal loss they had sustained beyond that which was covered by the insurance. That sum was not impressed with any trust, and the defendants cannot be trustees in respect of it for the plaintiffs. Indeed, as is manifest from the provisions of the Act of Congress, if the defendants had sued for this money in the American Court constituted under that Act as trustees for the underwriters, the money would not have been paid, and yet in every decided case in which the underwriters have been held entitled to the money received by the assured, they had a right to use the name of the assured for the purpose of recovering the money. The underwriters have no independent right to sue in their own name, but must use that of the assured to recover compensation in respect of the thing assured: *Simpson* v. *Thomson.* (1) Here the Act of Congress would have expressly prevented the plaintiffs from receiving this compensation money, whether they claimed it in their own names or in the names of the defendants. The cases of *Randal* v. *Cochran* (2) and *Blaauwpot* v. *Da Costa* (3), which are relied on in support of the plaintiffs' claim, are distinguishable on the ground that what the assured there received was compensation in the nature of salvage, in respect of vessels insured which had been captured by the enemy. In the latter of these cases the Lord Keeper, Lord Northington, said, "The assured had this right of restitution vested in them against the Spanish captors, which was afterwards prosecuted by the Crown by reprisals. Satisfaction having been made in consequence of this capture, I think the plaintiffs," the underwriters who had paid as for a total loss, "are entitled to the benefit, and that it was received by the executors," of the assured, "in trust for them." "As to the nature of the salvage, it was so much saved out of the hands of the Spaniards by means of the interposition of the Crown." The opinion of Chief Justice Kent in *Gracie* v. *New York Insurance Co.* (4), is really only to the same effect: it supposes a case in which France might make compensation for a cargo which had been insured, and which the French had captured, and states that if such com-

(1) 3 App. Cas. 279.
(2) 1 Ves. Sen. 98.
(3) 1 Eden, 130.
(4) 8 John. N. Y. Rep. 237.

pensation should be made, the Government of the United States, to whom it would be payable, would become trustee for the party having the equitable title to reimbursement, and this he states would be the insurers if they had paid the value of the cargo they had insured. There it would be in the nature of salvage of the thing insured, and there, moreover, there was not existing, as there was here, an impediment to the insurers claiming as such. The money was not paid by the government of the United States by way of restitution of the thing insured, but as a free gift, or as if it were out of a subscription made to indemnify those who had sustained a personal loss from the war, and for which they were not compensated by any insurance.

Butt, Q.C., and *Cohen, Q.C.* (*Hollams*, with them), for the plaintiffs. The questions are, first, whether this money was paid to the defendants purely as a bounty or not; and, secondly, assuming the cargo was a matter to which the underwriters, after payment as for a total loss, would be subrogated, whether the plaintiffs would be precluded from recovering in this action by the Act of Congress. In the *North of England Insurance Association* v. *Armstrong* (1) the underwriters were held to be subrogated to the right of the assured, and to be entitled to the money recovered in the Court of Admiralty against the owners of the vessel which had run down the vessel insured, and this has been followed in *Darrell* v. *Tibbitts* (2), where on payment of the loss the insurer was held to be entitled to be put in the place of the assured, so that if the assured should receive compensation from any other source for the loss, the insurer is entitled to recover it from the assured. Supposing the defendants, after they had received this money from the American tribunal, had sued the plaintiffs on the policies, would not the amount the defendants had so received have been an answer pro tanto to the action? Lord Cairns states in the House of Lords, in *Simpson* v. *Thomson* (3), "that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss." The case of *Stewart*

(1) Law Rep. 5 Q. B. 244. (2) 5 Q. B. D. 560.
(3) 3 App. Cas. 284.

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v. *Greenock Marine Insurance Co.* (1) decides that in all cases of marine insurance in which the subject insured is not actually annihilated, the assured claiming as for a total loss must give up to the underwriters all the remains of the property recovered, together with all benefits incident to it, or rather that such property vests in the underwriters.

It cannot be denied by the defendants that unless this money was given as a pure act of bounty, and was not given in respect of the subject-matter of the assurance, the plaintiffs, the underwriters, would be entitled to receive it. It is given wholly in respect of the cargo which was lost, and is in the nature of salvage, just as much as if the cargo had never been destroyed, but had been recaptured by the American Government and restored to its owners.

[BRETT, L.J. The United States, where alone this money can be recovered, say by their Act of Congress that they will not give it except where the property lost is uninsured, and that they will not give anything in respect of what is insured.]

It may be granted that there was no legal right to this money, which the defendants could have enforced against the United States Government, but yet they had that moral right when money by way of compensation had been received from England, under the circumstances in which this was received, as would, after the defendants had so obtained it, make them, according to the authorities, both English and American, trustees to those equitably entitled to it, namely, the underwriters.

Gathorne Hardy, replied.

BRAMWELL, L.J. I cannot, with the greatest respect for the opinion of Lord Coleridge, and, I am sorry also to have to add, for the opinion of my Brother Baggallay, think that this judgment is right, and as the matter is short and without any complication, it is unnecessary to take time to consider our judgment any further.

It is, however, some gratification to me to think that I really do not differ from a word that Lord Coleridge has said in his judgment. It seems to me that the erroneous conclusion he has come

(1) 2 H. L. C. 159.

to has arisen from his dealing with the case as if there were only two points in it, whereas, to my mind, there is a third and a most important one. His Lordship says, "Two points arise. First, Is the value in the policy which has been paid absolutely conclusive, in case of actual total loss, between the parties to the policy? and, Secondly, Was the payment of their money to the defendants more than a free gift: a pure act of grace on the part of the United States?" There is, it seems to me, a third and most material point, viz., this, supposing the payment was either a free gift, or something more—was it that which could be called a portion of the salvage of the thing insured? Whether this point was made before Lord Coleridge I do not know, that does not appear, but he has not put it; and it seems to me that it is a question upon which our decision should turn.

Now Lord Coleridge dealt with the first question, and says that there has been an actual total loss, and that, subject to a certain qualification, the valuation in the policy is conclusive between the parties. He then says, "Was there any right or was the awarding of the money by the United States Court merely a free gift of the money, a mere act of grace on the part of the United States government? If it were, I am of opinion that this action would clearly be not maintainable, and at first sight there is much to be said for the contention that it was a mere act of grace." No doubt there is much to be said for such contention, because the American Government had got the money, and if they thought fit they might have said that persons in the position of the plaintiffs or the defendants should not have a dollar or a cent of it. Therefore, in one sense, it was an act of grace on their part. His Lordship afterwards thus continues: "It is therefore no doubt clear that the defendants could have had no legal claim capable of being enforced against the United States in their sovereign character. But it seems to be equally clear, as the result of great authorities both in England and in America, that if a country puts a fund of this sort in course of distribution by regular process amongst such of its subjects as are morally entitled to share in the fund, then what their subjects so recover they recover as a right, not perhaps enforceable by law, but yet with such a character of moral equity about it as makes them, in respect of what they so

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recover, trustees for those who in equity and justice are entitled to it." Then he says that "this appears to have been held in principle by Lord Northington, Lord Hardwicke, and Chancellor Kent, when Chief Justice of New York."

Now, agreeing with that reasoning in substance, I should have thought that if this sum of money had been awarded to the defendants because they had their cargo taken by the *Alabama* simpliciter, it would have been salvage, and would have been within the principles of the cases to which Lord Coleridge refers, namely, this, that where a right—not perhaps enforceable in any tribunal but still a right—is given to the assured by the Sovereign to receive certain money as a compensation for the loss of the assured's cargo or ship which had been assured, if he has been paid as for a total loss by the insurers, he must hand over what he so gets to those who are entitled to the salvage of the thing assured. I think those cases justify that proposition and contention of Lord Coleridge.

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But his Lordship, as I say, has omitted the question whether what was given in this case was given as salvage? Now, in my opinion, it clearly was not given as salvage. The Act of Congress says: "No claim shall be admissible or allowed by the said Court for any loss or damage for or in respect to which the party injured, his assigns or legal representatives, shall have received compensation or indemnity from any insurance company, insurer, or otherwise." It is not given therefore on account of that, "but," it goes on to say, "if such compensation or indemnity so received shall not have been equal to the loss or damage so actually suffered, allowance may be made for the difference." So that what the Act of Congress says in effect is this, if the party injured has insured goods by a valued policy and valued them under their real value, he shall receive nothing in respect of what was covered by the policy; but in respect of what was uninsured he shall receive an indemnity for the loss sustained.

Now how, under those circumstances, can it be said that what the defendants received was part of the salvage of the thing insured? It seems to me to be impossible to say so. To use Mr. Hardy's argument, suppose a subscription had been got up, or suppose a national grant had been given for the encouragement

of moderate values being put on ships or cargoes in policies of insurance, and then when a loss occurred some compensation was to be made out of it to owners who had suffered? How could such compensation be said to be part of the salvage?

Take another illustration—if the court constituted by Congress be still sitting the owner might still go there and say, "I am still a person who has not received an indemnity for my loss, because an English court of law has ordered me to pay it to the underwriters, therefore I ask the Court to give me something more." Furthermore, in the cases before Lord Hardwicke and Lord Northington, and in the case before Chief Justice Kent at New York, a proceeding had been pending by the underwriters; but suppose proceedings had been taken by the underwriters in the present case to recover this money, on the ground that they and not the assured were the persons entitled to the salvage, and that if necessary they would make the assured a defendant. Could such an action have been maintained in the United States? If the present plaintiffs had gone before the court constituted by the Act of Congress and had claimed as the underwriters upon the policy to be entitled to the salvage, because the cargo was under-insured, it is clear that their claim would not have been maintainable for a moment. As to that Lord Coleridge says:—"It has been said that the Act of Congress prevents the plaintiffs from recovering. Probably in the American Courts that is so, but the Act of Congress cannot affect the rights of litigants in English Courts." Now that is true, but if his Lordship had had his attention called to what I call the third question, namely, as to salvage, he might have decided the other way. I cannot help thinking that in this case one may fairly bear in mind the maxim, "cujus est dare, ejus est disponere." The United States have chosen to give a sum, not by way of salvage, but by way of indemnity, to the defendants who have been injured, because they were under-insured; therefore the defendants are entitled to keep this money which has been given to them to keep, and in no sense to hand over. The consequence is that the judgment for the plaintiffs must be reversed.

BAGGALLAY, L.J. I have the misfortune to differ from my colleagues. It appears to me that the view taken by Lord

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Coleridge on the trial, and the reasons assigned by him for taking that view, are correct, and I entirely agree in them.

If the distribution of this money had been a mere act of grace on the part of the United States, it is clear that the plaintiffs would have had no case whatever in an English Court. But I am unable to distinguish the circumstances under which this fund was distributed, and the claim made by the present defendants, from what took place in the case of *Randal* v. *Cockran* (1) which came under the consideration of Lord Hardwicke in 1748, or in the case of *Blaauwpot* v. *De Costa* (2), which came under the consideration of Lord Northington in 1758. No doubt the fund was one which the United States, in the present case, and the British Government in the cases I have referred to, could have dealt with in any way they thought fit; but it was thought proper in both cases to place that money in such a form as that rights to it might be asserted when based on a particular claim. In the cases in the British Courts, it was based on the injury which merchants had sustained by reason of seizures by vessels of the Spanish Government. The fund having been placed at the absolute disposal of the Sovereign, was distributed in that way, and it was held that the plaintiffs in those cases were entitled to recover the money under that distribution.

Now, it is said in the present case, that what has been recovered from the United States by the present defendants, is not in the nature of anything arising out of the insurance, but money paid to the defendants entirely in respect of the difference between the full value of the cargo and the amount for which they had been insured. But it is to be borne in mind, that the policies here were valued policies, and it appears that the principle on which the case of the *North of England Insurance Association* v. *Armstrong* (3) was decided, was, that the insurers who have paid a total loss are entitled to all that is recovered in respect of that loss.

It is quite clear in this case, that the claim which was made before the United States Commissioners by the present defendants, was based entirely upon the loss of the cargo of the *Lamplighter* by the *Alabama*.

(1) 1 Ves. Sen. 98. (2) 1 Eden, 130.
(3) Law Rep. 5 Q. B. 244.

It appears to me, therefore, that the action is well founded, and that the judgment of Lord Coleridge was right, and that consequently, according to my view, the appeal should be dismissed.

BRETT, L.J. If we had not had ample opportunity during the discussion, of thinking over the point in this case which is so simple a one, I should certainly after hearing that my Brother Baggallay differed, have taken time to consider it; but, as we have given to this point all the deliberation that we are likely to give to it, and as we are not likely to change our minds, I will state now my opinion.

This money was, in the first place, paid to the American Government by the English Government, under a treaty by which the American Government did not bind themselves to the English Government as to its disposal, nor undertake that it should be given to the persons whose property had been taken by these cruisers. Therefore, when the money first came into the hands of the American Government, they were under no obligation of any kind, whether enforceable or not, to give it to the defendants, or to any other person in a similar position; but were at liberty to make a free gift of it to anybody whom they chose.

Now if, notwithstanding this, they had paid this money to the defendants as a portion of what may be called the salvage, or purely in respect of the loss, it may be that the mere fact of their not being under any obligation to do so, would not have prevented the right of the underwriters to have it. It may be, that that is the effect of the cases before Lord Northington and Lord Hardwicke; though I doubt whether their decisions were on the principle that the money was in the hands of the English Government to give it or not as a pure gift. As I gather, the principle of those decisions was that the Government had received the money for the assured, who having a right which they could not enforce, the Government had undertaken to get the money for them. Yet as the assured never could have recovered that money from the Government, it might be said that the money was in the hands of the Government to give or not to the assured as a pure gift. Still, I do not think that that was the principle on which those cases was decided; and if that were so, unless I am bound

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by them, I should be unable to follow those decisions. However, if this money had been paid over as a part of the salvage by the United States to the defendants, those decisions might have been authorities binding upon us.

It seems to me that the true principle on which to decide this case is, that the money was in the hands of the American Government, so that they might make a pure gift of it as they pleased, and that they did not pay it to the defendants in this case in respect of the loss of the goods, or as part of that which was salvage, but as a gift, because the assured had not insured the goods to their full value. By the Act of Congress the Government of the United States said that they would pay to persons in the position of the defendants, if they had not been insured at all, or if they had insured but had not recovered, and could not recover, from their insurers; or if though insured, they were not fully insured; but then only, not in respect of the loss, nor in respect of what such persons had insured, but in respect of what they had not insured.

Now, that seems to me to make the case wholly different from the cases decided in England. This money could not have been recovered in England at all by the assured. It could only have been recovered in the United States, where it must have been sued for, not in any ordinary court, but only before the special commissioners constituted under the Act of Congress. If the defendants had stated to those commissioners that they had been insured and had been paid the insurance, and were claiming the money for the underwriters, or if the underwriters had sued in the names of the assured and those matters had been declared to the commissioners, not a penny would have been recovered, because of the provisions of the Act of Congress; whereas in the English cases which have been cited the declarations of these facts would have made no difference at all, and the money would equally have been recovered.

The present case seems therefore, to me much more like the case put by Lord Blackburn in the House of Lords in *Simpson* v. *Thomson* (1); and as the assured, if these facts had been known, never could have recovered, so the underwriters cannot get this

(1) 3 App. Cas. 293.

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money back from them. It is by the American statute as a pure gift from the American Government that this money is paid to the defendants. It is not paid by way of salvage, but for another reason altogether, namely, that the defendants were under-insured.

I think, therefore, that this case is distinguishable from those English decisions; and that the plaintiffs, the underwriters, are not entitled to this money, and that the judgment for them should be reversed.

Judgment reversed.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Markby, Stewart, & Co.*

[IN THE COURT OF APPEAL.]

March 11.

(C. A.) Ex. D.

DANFORD *v.* McANULTY.

Practice—Pleading—Action for Recovery of Land—Defence that Defendant is in possession of Land—Omission to deny Plaintiff's Title—Rules of Court, 1875, *Order XIX., rule* 15.

In an action for the recovery of land a defence simply alleging that the defendant is in possession thereof, operates as a denial of the plaintiff's title and requires him to prove the truth of the allegations in the claim.

Affirmed by H. of L. 8 App. Cas. 456 H. L.

ACTION for the recovery of land.

The plaintiff deduced his title to the land in dispute under a will containing numerous limitations, and made many years before action. The claim alleged that the preceding estates created by the limitations had failed or been exhausted, and that he was now entitled to the land. The defendant pleaded simply that he was in possession of the land. At the trial before Stephen, J., the counsel for the plaintiff took the objection, that as no denial of the allegations in the claim was contained in the defence, the truth of these allegations was admitted and the plaintiff thereby relieved from proving them, the defendant being entitled to a judgment only on proving some title giving him a right to possession notwithstanding the admitted title of the plaintiff. The learned

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judge took this view, and no satisfactory defence being offered by the defendant, judgment was given for the plaintiff for the recovery of the land.

The defendant appealed.

March 7, 8. *Mellor, Q.C.* (*J. S. Dugdale,* with him), for the defendant. The statement of defence, that the defendant is in possession, is sufficient to put the plaintiff to prove his claim to recover the land without any specific denial by the defendant of any of the allegations in the plaintiff's statement of claim. The learned judge at the trial wrongly construed Order XIX., r. 15 (1), and notwithstanding the words of that rule, which expressly say that "it shall be sufficient to state by way of defence that he is so in possession," gave judgment for the plaintiff.

[BAGGALLAY, L.J. Does that rule mean any more than that, except where the defendant relies on some equitable right, he is not bound to state his title?]

Yes, it means that such a defence shews that the defendant is lawfully in possession, and it therefore puts the plaintiff to the proof of every allegation in his statement of claim which is material to give him a right to recover the land.

A. Charles, Q.C. (*W. Graham,* with him), for the plaintiff. The rules of pleading introduced by the Supreme Court of Judicature Acts, 1873, 1875, require each party to an action to disclose his case: Rules of Court, 1875, Order XIX., rules 4, 17 (2); and as

(1) Rules of Court, 1875, Order XIX., rule 15: "No defendant in an action for the recovery of land who is in possession by himself or his tenant need plead his title, unless his defence depends on an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff. But, except in the cases hereinbefore mentioned, it shall be sufficient to state by way of defence that he is so in possession. And he may, nevertheless, rely upon any ground of defence which he can prove, except as hereinbefore mentioned."

(2) Rules of Court, 1875, Order XIX., rule 4: "Every pleading shall contain as concisely as may be a statement of the material facts on which the party pleading relies."

Rule 17: "Every allegation of fact in any pleading in an action, not being a petition or summons, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, shall be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition."

the defendant has failed to give notice that he disputes the plaintiff's title, he must be taken to have admitted it.

Mellor, Q.C., in reply.

Cur. adv. vult.

Mar. 11. The following judgments were delivered :—

BRAMWELL, L.J. This case is somewhat curious. Stephen, J., construed the rule in favour of the plaintiff; and I confess that if I had been in his situation I should have done the same, and I own that I think that construction reasonable. I wish to say why I consider the construction reasonable. A man in possession of land has a right to call upon a plaintiff in ejectment to prove his title; if the plaintiff does prove a primâ facie title, then the man in possession must prove his. The rule is the same in respect of chattels; an action is brought to recover a chattel, the plaintiff must shew a title to the chattel before he can call upon the defendant to prove his title. If, however, the person in possession of either the land or the chattel does not deny by his pleading the title of his adversary, it seems to be just that in order to succeed he should be compelled to show a title existing in himself. But, whatever my own view may be, I am informed by Brett, L.J., who is one of the framers of the rule, and by all the other judges whom we have consulted, that the contention for the defendant is right and that the rule ought to be construed in his favour. Under these circumstances we must hold that Stephen, J., was wrong to give judgment for the plaintiff; consequently there must be a new trial, and this appeal must be allowed.

BAGGALLAY, L.J. I do not dissent from the course which it is proposed to adopt. If I were to form my own opinion upon the construction of the rules, which appear to bear upon this point, namely Order XIX., rules 15, 17, I should have thought that the view taken by Stephen, J., was right. It appears, however, that those who framed the rule are of a different opinion; therefore, for the reason given by Bramwell, L.J., I think that the order proposed is proper to be made.

BRETT, L.J. As the other Lords Justices have ultimately concurred in the view which I take, it is perhaps unnecessary for

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me to state the reasons why I think it correct: but, in justice to those who framed the rule, I may say that in my opinion very strong reasons may be given for holding that rule 15 clearly expresses the view that the mere assertion by the defendant of his possession is sufficient to put a plaintiff in ejectment upon proof of his case.

Appeal allowed.

Solicitors for plaintiff: *Remnant, Penley, & Grubbe, for W. E. Richardson, Birmingham.*

Solicitors for defendant: *S. W. Johnson & Son, for Robinson & Watts, Dudley.*

April 13.

(C. A.) Q. B. D.

[IN THE COURT OF APPEAL.]

THE INMAN STEAMSHIP COMPANY, LIMITED *v.* BISCHOFF AND OTHERS.

Insurance (Marine)—Policy—Freight—Loss by Perils of the Seas.

The plaintiffs were the owners of a steamship named the *P.*, which was chartered to the Commissioners of the Admiralty for transport service for three months certain at an agreed freight, which was not to be payable in the event of the steamship becoming unseaworthy or unfit to perform the service for which she was chartered. One month's freight was to be paid to the plaintiffs in advance. The plaintiffs effected with the defendants a policy of insurance in the ordinary form upon freight.

The *P.* sailed under the charter to the Admiralty with troops for South Africa, and soon after the expiration of the first month of the period for which she was chartered she struck on a rock, and was so damaged as to become unseaworthy and unfit to perform the service for which she had been chartered. She was thereupon discharged from the service of the Admiralty:—

Held, that the plaintiffs could not recover from the defendants the residue of the freight, which the *P.* would have earned during the time covered by the policy.

ACTION upon a policy of marine insurance upon freight.

The plaintiffs were the owners of a steamship named the *City of Paris.*

By a charterparty dated the 20th of February, 1879, and made between the Commissioners of the Admiralty of the one part, and C. T. Ellis (on behalf of the plaintiffs) of the other part, it was witnessed that the commissioners had hired and taken to freight the *City of Paris* "for service and employment as a transport

on monthly hire for the space of three calendar months certain, and thenceforward until the commissioners for executing the office of Lord High Admiral aforesaid for the time being shall cause notice to be given to the said second-named party, his executors or administrators, or to the master or other person having charge of the said ship, that she is discharged from her Majesty's service, such notice to be given when the ship is in port in the United Kingdom. And the said second-named party doth covenant and agree with the said commissioners in manner following, that is to say, that the said ship shall at all times during the continuance of this charter be strong, firm, tight, staunch, and substantial, both above water and beneath, and in every respect seaworthy and properly manned, fitted, stored, furnished, equipped, and found at the proper cost and charge of the said owners . . . . In consideration of which covenants and conditions it is agreed by the said commissioners for and on behalf of her Majesty in manner following, that is to say, that the said second-named party shall be allowed for the hire and freight of the said ship at the rate of 25*s.* per ton per calendar month . . . . during such time as the said ship shall be continued in her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged: that the said second-named party shall, on signing and sealing hereof, be entitled to receive a bill made out and registered according to the usage of the navy for one calendar month's freight upon account and in part payment according to the rate and tonnage aforesaid, provided it be certified by the inspecting officer that the said ship is ready to proceed on her Majesty's service. And after the said ship shall have been in the service two calendar months from the commencement of the said service and the said second party shall have produced to the said commissioners a certificate in the required form, the said second-named party shall be entitled to receive a further bill for a moiety of one month's freight upon account in manner aforesaid; and after the said ship shall have been in the said service three calendar months, and the said second-named party shall have produced to the said commissioners such certificate as aforesaid, the said second-named party shall be entitled to be paid a further bill for another moiety of one month's freight upon account, and each month after during

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the ship's continuance in the said service, if such certificate as aforesaid shall have been produced, the said second-named party shall be entitled to receive a further bill for one month's freight on account, and shall be paid the balance of freight on the passing in the office of the requisite accounts and documents after the discharge of the said ship, all which aforesaid payments shall be made in England by bills payable in three days from and after the respective dates thereof by her Majesty's Paymaster-General. Provided always, and it is hereby agreed and declared, that if at any time or times hereafter it shall be made to appear to the said commissioners that any delay has been caused or has accrued by breach of orders or neglect of duty, or that the said ship became incapable from any defect, deficiency, breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months . . . . and to put the said ship out of pay, or to make such abatement by way of mulct out of the hire or freight of the said ship as they shall adjudge fit and reasonable . . . . Enters into pay the 18th day of February, 1879." On the 22nd of February, the plaintiffs, through their brokers, effected with the defendants (who were underwriters) a policy in the ordinary form on "freight outstanding," and the insurance was to last "at and from and for and during the space of three calendar months, commencing the risk on the 20th day of February, 1879, and ending on the 19th day of May, 1879, both days inclusive." The defendants were aware that the *City of Paris* was under charter to the Government, but they did not in fact know the terms of it.

The *City of Paris* took on board troops, and in the month of February, 1879, sailed for South Africa; but on reaching the Cape of Good Hope, on the 21st of March, she struck upon a rock and received such injuries as to render her unseaworthy and unfit to carry troops. She was put out of pay, and upon the 17th of April, 1879, whilst still at the Cape, she was discharged from her Majesty's service by the senior naval officer at the Cape of Good Hope. After some delay her repairs were proceeded with, and she received a certificate of efficiency upon the 14th of May. The plaintiffs alleged that during the time covered by the policy

through the perils insured against a loss accrued to the plaintiffs of the freight covered by the said policy, which would have been earned between the 21st of March and the 19th of May, 1879.

At the trial, Brett, L.J., gave judgment for the plaintiffs.

The defendants appealed.

March 17; April 4. *C. Russell, Q.C.*, and *A. Cohen, Q.C.* (*J. G. Barnes*, with them), for the defendants, in support of the appeal.

Gully, Q.C., and *D. French*, for the plaintiffs.

The arguments are sufficiently stated in the judgment hereafter set forth.

The following cases were cited:—

As to the construction of the policy of insurance: *Jackson* v. *Union Marine Insurance Co.* (1); *Allison* v. *Bristol Marine Insurance Co.* (2); *Rankin* v. *Potter* (3); *Ripley* v. *Scaife* (4); *Havelock* v. *Geddes* (5); *Taylor* v. *Dunbar* (6); *Harrower* v. *Hutchinson* (7); *Bates* v. *Hewitt.* (8)

As to how far the charterparty could be looked at in construing the policy of insurance: *Halhead* v. *Young.* (9)

Cur. adv. vult.

April 13. The judgment of the Court (Lord Coleridge, C.J., Bramwell and Baggallay, L.JJ.) was delivered by

BRAMWELL, L.J. The first question argued in this case turned on the clause in the charterparty, that "if at any time it shall be made to appear to the commissioners that the ship became incapable, from any defect or cause whatsoever, to perform efficiently the service contracted for, then it shall be lawful for the commissioners to retain in arrear the pay of the ship for two months, and to put the ship out of pay." The ship having become disabled by perils of the seas, and requiring repairs, the doing of which would last a considerable time, the commissioners, acting

(1) Law Rep. 10 C. P. 125.
(2) 1 App. Cas. 209.
(3) Law Rep. 6 H. L. 83.
(4) 5 B. & C. 167.
(5) 10 East. 555.
(6) Law Rep. 4 C. P. 206.
(7) Law Rep. 4 Q. B. 523.
(8) Law Rep. 2 Q. B. 595.
(9) 6 E. & B. 312.

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under this clause, did put the ship out of pay, and so the plaintiffs said the freight was lost, and lost by perils of the seas. The defendants answered that either the commissioners had no power to do what they did, and, if not, the freight was not lost; or that they had, and if so, the freight was not lost through perils of the seas, but through the peculiar powers given to the charterers. This argument supposes that the charterparty may be read as though set out in the policy. No doubt it not only may, but must, be looked at, and, for the purposes of this question at least, may be read as though set out in the policy. But what then? The question still arises, Was the loss of the freight a loss by perils of the seas? We are of opinion it was not. We are of opinion that but for the particular clauses in this charterparty, freight would have continued to be earned, notwithstanding perils of the seas. It must be carefully borne in mind that the hiring was not for three months merely, but was for an indefinite time, viz., till notice should be given by the commissioners when the ship should be in a port in the United Kingdom, with a provision that the minimum term of hiring should be three months. Now it is clear then, on reason and authority, that but for the clause enabling (if it does enable) the commissioners to put the ship out of pay, she would have continued on it till she returned to the United Kingdom and was discharged, including the time necessary for repairs. That this is so, is strengthened by the consideration of the provision in the charterparty, that the ship shall at all times during the continuance of the charterparty, be strong, firm, tight, staunch, and in every respect seaworthy. For that involves repairs necessary being done to the ship during the time included in the charterparty. But for the clause in question, therefore, the time in the charterparty would have run during the time of those repairs, and till the ship was discharged in a port in the United Kingdom. The perils of the seas, therefore, have not caused the loss of freight. They are causa sine quâ non, but not causa causans, not the proximate cause of the loss. Suppose there had been a clause that the ship might be put out of pay if she stranded, and she had stranded, not been injured, but put out of pay. That would have been a loss in one sense by perils of the seas, no less than this, but clearly not covered by the policy.

Mr. French, however, took another point. He said, and apparently correctly, that the charter freight accrued de die in diem, but only while the ship "duly and efficiently performed the service;" that perils of the seas had prevented such due and efficient performance, and so the freight was lost by such perils. We are of a different opinion. There is no exception of perils of the seas in the charterparty to excuse the shipowner; but the clauses, which say when he shall be liable, by implication exclude a liability caused by perils of the seas. Those words, "duly and efficiently perform, &c.," do not constitute a condition precedent. That is manifest from this, that if they did, then, though the service was rendered, but not duly and efficiently, the plaintiffs would not be entitled to any payment. For example, if through mismanagement, or even misfortune, five weeks were consumed in doing what could be done in four, no payment would be due. This cannot be. The remedy in such case is by cross action or putting the ship out of pay, the power to do which makes the construction contended for the less needful and probable. Further, the payment is to be monthly, and the second payment is to be after the ship has been two months in the service from the commencement of the service, and is to be a moiety of one month's freight. This is inconsistent with the contention of Mr. French. It may be asked, What is the meaning of the words? The best answer we can give, is to say about the same as the meaning in a lease of the words that "the lessee well and truly paying rent and performing covenants may quietly enjoy," &c. We think, then, that the plaintiffs fail on this ground also, and that the judgment must be reversed.

This renders it unnecessary to consider other questions; but we may add, we are quite of opinion that this policy includes such a freight as that in the charter, viz., a time freight.

Judgment reversed.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Rawle, for Hill & Dickinson, Liverpool.*

Solicitors for defendants: *Waltons, Bubb, & Walton.*

1881
April 2.
Q. B. D.

OVERSEERS OF WOOLWICH *v.* ROBERTSON.

Burial—Dead Bodies cast on Shore from Sea—Tidal River—Liability o Parish—48 *Geo.* 3, *c.* 75.

By 48 Geo. 3, c. 75, s. 1, the overseers of parishes throughout England in which any dead human bodies shall be found thrown in or cast on shore from the sea, by wreck or otherwise, are required to cause such bodies to be buried, and by s. 5, the overseers are to be reimbursed such expenses by the county treasurer.

A steam-ship was sunk by collision in the river Thames, near Woolwich, at a place below low water mark, and a number of persons on board were drowned. Some of the bodies were found ashore within the boundaries of Woolwich in Kent, and were buried by the overseers. The river Thames, at Woolwich and at the places where the bodies were found ashore, is a navigable tidal river where great ships go:—

Held, that the county treasurer could not be made liable for the expenses incurred by the overseers, for the bodies were not cast on shore "from the sea" within the meaning of the Act.

Upon appeal against a refusal of the respondent, a justice for Kent, to make an order on the treasurer of the county for the repayment to the appellants of certain costs and expenses alleged to have been incurred by them under 48 Geo. 3, c. 75, the sessions dismissed the appeal subject to the following case.

1. On the 3rd of September, 1878, a collision occurred in the river Thames near Woolwich, between the steam-ship *Princess Alice*, whereby the *Princess Alice* was sunk and became a wreck, and more than 600 persons, being the passengers by, and crew of, the vessel, lost their lives by drowning. The place where the vessel was sunk was about the middle of the river, below low water mark. The shores on either side of the river at the spot where the vessel sunk are respectively parts of the parishes of Woolwich and Plumstead, in the county of Kent.

2. A few of the bodies of the persons so drowned, were found ashore below Woolwich, on the Essex bank of the river Thames, but no charge has been made by the appellants in respect of these bodies. A few more of the bodies were found ashore on the Kent banks of the river Thames within the boundaries of the parishes of Woolwich, Plumstead, and Erith, one of which bodies at least was found ashore within the boundaries of the parish of Woolwich.

The remaining number of the bodies of the persons drowned were found floating on the water or sunk in the wrecked vessel.

3. The bodies mentioned in paragraph 2 (except such as were previously claimed and removed by relatives) were from time to time, received and collected in a steamer or boats, and were afterwards by direction of the county coroner for the district, with the consent of the dockyard authorities, landed at the dockyard pier or steps, in the parish of Woolwich, and then removed to a temporary dead house in the dockyard and parish.

4. Between 400 and 500 of the bodies were afterwards claimed by relatives or friends, and buried by them at their expense, but 120 of such bodies were buried by the churchwardens and overseers of Woolwich.

5. The overseers of Woolwich allege that they have expended the following sums:—

(*a.*) £270 in the burial of the 120 bodies. The expenses of burial exceeded those allowed in the parish of Woolwich for the burial of persons at the expense of the parish, as a sufficient number of coffins could not be procured at the ordinary parish charge.

(*b*) £752 in the removal of all the bodies from the dockyard pier to the dead house, as mentioned in paragraph 3.

(*c*) £118 in the reward at the rate of 5*s.* each body, to persons who found the bodies, whether floating or otherwise, and brought the same to the said steamer, boats, pier or steps, mentioned in paragraph 3.

6. The river Thames at Woolwich, and at the respective places where the bodies mentioned in paragraph 2 were found ashore or found floating or sunk in the vessel, is a navigable tidal river where great ships go. Its mouth, where it joins the sea, is more than thirty miles distant from the said places, but there is no bridge over the river either towards the sea or within a distance of ten miles above the spot where the steamer *Princess Alice* sank.

7. It has been the practice both as to the parish of Woolwich and also as to the neighbouring parishes of Erith and Greenwich, for a great number of years (up to and including the year in which the said expenses were incurred), for the county treasurer to reimburse the parishes the amount of expenses, not exceeding

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those on parish burials, incurred in removing and burying dead bodies cast on shore by the tide in the river Thames, within the bounds of the respective parishes, but the order for payment being made by justices in petty sessions, or often by a single justice, never came under the notice of the justices assembled in the courts of general sessions, and so passed unquestioned.

8. In the month of October, 1878, application was made on behalf of the appellants to the respondent, being a justice of the peace acting in and for the county of Kent, to order and direct the treasurer for the county to pay to them the amounts expended by them as mentioned in paragraph 5 hereof, which the respondent refused to do, and the appellants thereupon appealed to the quarter sessions.

The question for the opinion of this Court is:—

Whether the respondent should have made an order upon the county treasurer for the payment of the expenses set forth in paragraph 5, or any, and which of them?

Sir H. Giffard, Q.C. (*Wildey Wright*, with him), for the appellants. The Act 48 Geo. 3, c. 75 (1), must be interpreted with reference to the object with which it was passed, which was to

(1) By 48 Geo. 3, c. 75 [after reciting that no provision had been made by the laws in force for providing suitable interments in churchyards or parochial burying-grounds for such dead human bodies as may be cast on shore from the sea by wreck or otherwise], it is by s. 1 enacted that the overseers of the poor for the time being of the respective parishes throughout England in which any dead human body or dead human bodies shall be found thrown in or cast on shore from the sea by wreck or otherwise shall and they are hereby required upon notice to them given that any such body or bodies are thrown in or cast on shore by the sea and is or are lying within the bounds of the parish for which they shall be overseers to cause the same to be forthwith removed to some convenient place and with all convenient speed to cause such body or bodies to be decently interred in the churchyard or burial ground of such parish, so that the expenses attending on such burial do not exceed the sum which at that time is allowed in such parish for the burial of any person or persons buried at the expense of such parish.

By s. 3 in case any person or persons shall find any such body or bodies cast on shore from the sea or wreck or otherwise, and shall within six hours thereafter give notice thereof to some one of the overseers of the parish for the time being in which such body or bodies shall be found, then and in every such case such person or persons shall receive the sum of 5*s.* for his or her or their trouble.

By s. 5 all necessary and proper payments, costs, charges, and expenses

relieve particular parishes from the burden of burying the dead bodies of persons who lose their lives by shipwreck, and to cast this burden upon the county at large. This being its object, the question is whether the river Thames at Woolwich can be considered to come within the meaning of the word "sea." The Crown having by law the dominion and ownership over British seas it has been necessary to legally define the boundaries of the sea, and it has been laid down that all waters which communicate with the sea and are within the flux and reflux of its tides, are part and parcel of the sea itself: Hall on the Sea Shore, 2nd ed. p. 3, and the cases there cited. Accordingly, in *Rex* v. *Allen* (1), a conviction for larceny on board a vessel in a Chinese river twenty or thirty miles from the sea was upheld. *Reg.* v. *Cunningham* (2) and *Reg.* v. *Anderson* (3) are similar cases; and the law is further discussed or illustrated in *M'Cannon* v. *Sinclair* (4); Hale's Pleas of the Crown, vol. ii. p. 17, and Coke Inst. pt. 3, c. ix. p. 58, Deodands. Secondly, there can be no distinction with regard to the bodies which were picked up while floating in the water, for it could not have been meant to place difficulties in the way of bringing such bodies to the land for the purpose of burial.

F. M. White, Q.C. (*Kingsford*, with him), for the respondent. The Act 48 Geo. 3, c. 75, was passed with reference to the common law, by which parishes are under no liability to bury bodies cast

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which shall be made or incurred in or about the execution of this Act shall be made and paid by the overseers for the time being of such respective parishes and places.

By s. 6 it is provided that for the purpose "of reimbursing all such payments, costs, charges, and expenses it shall and may be lawful to and for any one justice for the county or place within England in which any such body or bodies shall have been so removed and buried as aforesaid by any writing under his hand to order and direct the treasurer for such county to pay such sum or sums of money to such overseers, for his or their costs and expenses in or about the execution of this Act (after the same shall have been duly verified on oath) as to the said justice shall seem reasonable and necessary; and such treasurer shall and he is hereby authorized and required forthwith to pay the sum or sums of money so ordered and directed to be paid to the person or persons empowered to receive the same; and such treasurer shall be allowed the same in his accounts."

(1) 1 Mood. C. C. 494.

(2) Bell's Cr. C. 72.

(3) Law Rep. 1 C. C. R. 161.

(4) 2 E. & E. 53.

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ashore by the sea: *Reg.* v. *Stewart.* (1) The Act 7 & 8 Vict. c. 101, s. 31, enables guardians or overseers to bury the bodies of paupers at the expense of the parish where they have died or their bodies may be, but the present question is the liability of the county under 48 Geo. 3, c. 75, i.e., whether the river Thames can be included under the term "sea." There is nothing to shew that this word is not used in its ordinary sense, and in common parlance, the word "sea," especially when used in connection with "wreck," would not be supposed to apply to a tidal river. In Richardson's Dictionary, Sea, it is said that the word is opposed geographically to rivers and lakes, and in the Act relating to the jurisdiction of coroners, 6 & 7 Vict. c. 12, provision is made for inquests upon bodies found dead in the sea "or any creek, river, or navigable canal within the flowing of the sea." In the Merchant Shipping Act, 17 & 18 Vict. c. 104, s. 476, the expression "sea or tidal water" is adopted.

With regard to the floating bodies, it could not have been meant that those who take them up should be able to charge any county by simply landing the bodies there.

LINDLEY, J. I am of opinion that our judgment ought to be in favour of the respondent, and that the case is not within the Act. The Act, as appears from its preamble, is a remedial measure, and it is our duty to construe it with reference to its object. But I cannot bring myself to think that the river Thames at Woolwich, from which these bodies came, is within the meaning of the word "sea." The recital of the Act is rather curious, and I think that any one on first reading it would suppose that the common law or some statute had imposed on all parishes the duty of burying dead bodies in cases where there was no other provision for their burial ashore. But *Reg.* v. *Stewart* (1) shews that there is no common law obligation upon parishes to bury such dead bodies, and we must approach the Act of Parliament with due consideration of this state of the law. Then, looking at the Act, we do not find in it a word about tidal rivers, creeks, estuaries, or other streams: we find the word "sea," and sea only. The words of s. 1 are, "that the overseers of any parish in which any dead

(1) 12 Ad. & E. 773.

bodies shall be found thrown in or cast on shore from the sea." There might perhaps be a little ambiguity as to whether this meant thrown into the sea or cast ashore, but looking at the succeeding section, there can be no doubt that it means cast ashore by wreck or otherwise, and to make the county liable the case must be brought within s. 1 of the Act. What ground is there for extending the meaning of the word "sea"? When we look at other statutes, we find that the sea is always contrasted with river. In the Act 15 Rich. 2, c. 3, defining the limits of the jurisdiction of the Admiralty, rivers are mentioned by name, and I am not aware that in any statute the word "sea" is used as synonymous with the word "river." Upon the whole it would appear that the question of what are in any particular case the boundaries of the sea properly so called, is substantially one of fact. The justices have not found, as a fact, that the water from which the bodies were cast ashore is the sea, and I think that we cannot, upon the materials before us, decide that the county is liable.

MATHEW, J. I am of the same opinion. We are not called upon to say whether any duty, statutory or otherwise, was imposed upon the parish of burying these bodies in the first instance. The question is whether the county is bound to reimburse them the expenses which they have incurred, and for this purpose we have to consider what is the sense in which the word "sea" is used in the Act. I can find nothing in the Act to shew that the word "sea" was intended to comprise navigable tidal rivers.

With reference to the bodies which were picked up when floating in the water and afterwards taken into Woolwich, the appellants must be driven to argue that those who picked up the bodies might at their pleasure select one county instead of another for the reception of the bodies. It seems to me quite clear that the legislature made provision for bodies which were washed ashore, and not for such as may be found floating on the water.

Judgment for the respondent.

Solicitor for appellants: *Hughes, Woolwich.*
Solicitor for respondent: *Scudamore, Maidstone.*

1881
March 8.
Q. B. D.

LYONS *v.* TUCKER.

Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss* 8, 10—*Unregistered and Registered Bills of Sale—Priority.*

Chattels were assigned to the defendant by a bill of sale, which was not registered. The grantor subsequently gave another bill of sale comprising the chattels to the plaintiff, who registered it. The defendant afterwards took possession of the chattels under his bill of sale. In an action against him by the plaintiff for conversion:—

Held, that the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, enacting that "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels," did not affect the priority of the unregistered bill of sale.

Reversed on appeal 16 Q.B.D. 212.

APPEAL from the county court of Devonshire holden at East Stonehouse.

On the 4th of October, 1880, Stranger, by bill of sale assigned his chattels to the defendant. On the 8th of November, Stranger gave another bill of sale purporting to assign the chattels to the plaintiff, who registered it. On the 26th of November, the defendant seized the chattels under his bill of sale. On the 27th of November, the plaintiff gave notice to the defendant that he claimed the chattels, and afterwards brought an action in the county court for the conversion of them, when he contended that his bill of sale being registered and the defendant's bill of sale being unregistered, he, the plaintiff, had priority under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10. The county court judge gave judgment for the defendant.

A rule nisi having been granted to set aside the judgment and enter it for the plaintiff, on the ground that the plaintiff as holder of a registered bill of sale had priority, by reason of ss. 8 and 10 of the Bills of Sale Act, 1878, over the defendant's earlier unregistered bill of sale;

A. Charles, Q.C., shewed cause. This is no case of an execution or bankruptcy, and only in such cases is a bill of sale void for want of registration: 41 & 42 Vict. c. 31, s. 8. The plaintiff relies on the clause in s. 10, that "In case two or more bills of sale are given, comprising in whole or in part any of the same

chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels." But that provision must be read with s. 8, and does not affect holders of bills of sale except in the cases specified by that section: *Davis* v. *Goodman*. (1) There reliance was placed on the general terms of the attestation clause in the same s. 10. But the Court of Appeal held that it must be read with s. 8. And see *Ex parte National Mercantile Bank. In re Haynes*. (2) The true construction of the priority clause is that it only applies to two registered bills of sale; as the words "their registration" shew. They would not apply to two bills one of which only was registered. In the absence of such clause registered bills of sale would take priority of each other according to the date of their execution and not of their registration. But to encourage registration priority is given as a reward for promptitude in registering.

[GROVE, J. Then if the defendant here had registered, he would be worse off than unregistered.]

On the other hand, if the contention of the plaintiff is right, although the defendant has perfected his title by taking possession he would be defeated by the registered bill of sale. Surely the legislature did not intend to affect the rights of bill of sale holders inter se, by three or four lines in an Act relating to the avoidance of bills of sale as against execution creditors and trustees in bankruptcy.

[LINDLEY, J. What reason was there for declaring priority according to date of registration as against those classes?]

To assist the person who has to distribute the proceeds of sale, viz., the sheriff or trustee, in ascertaining who is entitled to them. If the priority clause applied, then, although the first grantee actually seized the goods within the seven days allowed for registration, he would be defeated by a second bill of sale registered, and opportunities for fraud would be given to the grantor.

R. S. Wright, in support of the rule. The object of the enactment was to apply to chattels the principle of the Land Registry Acts, whereby registered mortgagees are, in register counties, preferred to prior unregistered mortgagees.

(1) 5 C. P. D. 128. (2) 15 Ch. D. 42.

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Davis v. *Goodman* (1) is not in point. There the question was between grantor and grantee, and the effect of the decision overruled was to strike s. 8 out of the Act. Here, however, the question is between mortgagees, and the construction for which the defendant contends has no such effect. The Court of Appeal dealt only with the earlier part of s. 10 not now in question, and said not a word tending to decide the present point. The priority clause in s. 10 is a complete and separate enactment. There are certainly some distinct provisions in the Act, e.g., s. 20, in favour of bills of sale holders and against trustees in bankruptcy. So the priority clause cannot be meant for the good of the sheriff or trustee in bankruptcy, who, if there are two registered bills of sale, are indifferent as to which will take the proceeds. Registration will not, as is argued, help the sheriff or trustee in paying over the proceeds—for it will not inform them which is the true and which the sham bill of sale. The words of the clause are "in case two or more bills of sale are given." But the defendant seeks to insert the word "registered," which is not there. The provision is that a registered bill of sale shall have priority over every other bill of sale registered or unregistered. The object of the legislature is to encourage the publication of charges on property. The fact that the defendant took possession did not give him priority: *Ex parte Allen.* (2)

Cur. adv. vult.

March 8. GROVE, J. The clause in question which forms part of s. 10, and is nearly at the end although not the last paragraph of it, provides that "In case two or more bills of sale are given comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels." It was argued for the plaintiff that, the words being, "two or more bills of sale," and not "registered bills of sale," as priority is given in the order of the date of "their registration," a registered bill of sale would have priority over a prior unregistered bill of sale, even although the unregistered bill of sale was carried into execution and the title perfected by taking possession of the goods after the registration

(1) 5 C. P. D. 128. (2) Law Rep. 11 Eq. 209.

of the second bill of sale. At first, my mind was in favour of the plaintiff's contention, for it seemed strange that a bill of sale first registered should have priority over an earlier bill of sale secondly registered, and not over an earlier but unregistered bill of sale. But during the argument, I found much more to be considered than the mere words of this section alone, and I have come to the conclusion, and my Brother Lindley agrees with me, that the clause only applies to registered bills of sale. I will now state my reasons for holding that the county court judge was right, and that the defendant is entitled to judgment. The Bills of Sale Act, taking it generally, does not render void all bills of sale. It does not destroy the power of conveying property by bill of sale, particularly when possession is taken after it. It only produces a limited effect on them, viz., by saying that every bill of sale to which the Act applies shall be duly registered within seven days, otherwise such bill of sale as against trustees or assignees in bankruptcy or liquidation, and sheriff's officers and execution creditors, "shall be deemed fraudulent and void, so far as regards the property in or right to the possession of any chattels comprised in such bill of sale which, at or after the time of filing the petition for bankruptcy or liquidation, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale," &c.: s. 8.

Therefore all that the legislature intended and declared by the Act is that bills of sale unregistered are not absolutely void, but are to be deemed fraudulent and void as against the classes of persons named in s. 8. If we were to construe it as the plaintiff's case would require it to be construed, we should be extending this Act in a way which does not seem to have been intended, and, in other words, bring in the relation between grantor and grantee of bills of sale, and say that bills of sale if unregistered shall be deemed fraudulent and void as against all subsequent grantees under registered bills of sale of the goods, and we should not be confining the operation of s. 8 to the particular class of persons as against whom unregistered bills of sale are declared by the Act to be fraudulent and void. I do not exactly know why the word "fraudulent" is used in the section, for the word

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"void" would seem to be enough. It seems strange in this and other Acts of Parliament to call that fraudulent which may be quite bonâ fide. If the bill of sale is fraudulent the statute is not required at all. We are asked virtually to declare fraudulent and void a bill of sale which is bonâ fide and untainted by fraud, and has been carried out (though, indeed, after the execution of the second bill of sale) by seizure of the property. Previously to the Bills of Sale Act, 1878, the first grantee would have had an absolute title against all the world, for he had a conveyance of the property to him, and had seized it. Does the Act indirectly take away his title, and does the registration of the second bill of sale compel that title of the first grantee to be deemed, at least, void, if not indeed fraudulent and void? First, the words of the section do not carry it so far. If the words had been "in case of two or more registered bills of sale," then the case would have been clear in favour of our view of it. In the other view the words as they stand, "two or more bills of sale," primâ facie mean registered or unregistered bills of sale. But in the continuation of the section the words "their registration" are used in relation to the antecedent words, "two or more bills of sale," so therefore they must be assumed to be registered bills of sale, otherwise the word "their" would not apply. Suppose two bills of sale only, and one unregistered, there would be nothing to which the word "their" would apply, and therefore grammatically we should rather assume that the bills of sale mentioned in the section were registered bills of sale. This, however, though grammatical, might be a narrow construction of the language of the clause if we had that alone to guide us, and therefore it is not on the grammatical construction alone that I decide this case.

The language of statutes is peculiar and not always that which a rigid grammarian would use; we must do what we can to construe them. As there is nothing in the section prohibiting the view of the defendant, but, on the contrary, the grammatical construction is in his favour, let us look at the decisions bearing on the matter. In that we are much assisted by the case of *Davis* v. *Goodman* (1) in the Court of Appeal, where the question arose on the first provision of s. 10. In *Davis* v. *Goodman* (1)

(1) 5 C. P. D. 128.

it was contended that s. 10 was an irrespective proviso, and that all bills of sale, whether registered or not, were to be invalid unless the conditions as to attestation by a solicitor were complied with; but the Court of Appeal held that s. 10 was to be read with s. 8, and that the object of the Act was only to cause a limited avoidance of bills of sale, viz., to avoid them as against such persons as are mentioned in s. 8. So by our construction of the Act we are carrying out that decision, more especially as the clause now in discussion forms part of s. 10. Not merely the general scope of the decision itself, but the reasoning of the decision, tends to shew that we are following out the same view, and that which was fairly intended by the scope of the judgments in the Court of Appeal. Several inconveniences were pointed out on both sides. On the one hand, it was contended for the defendant, with much reason, that if the construction of the clause by the plaintiff were true, there would be a great power of committing fraud by the grantor, who might on Monday execute a bill of sale, and the grantee not immediately registering it within the seven days, the grantor, wishing to be paid twice for the same goods, might, later in the same day on which he had by bill of sale conveyed the goods to one man, grant them by bill of sale to another and even innocent man, but hint to him to get it registered immediately; and then, even if the first grantee pursued the Act and registered his bill of sale on Wednesday, yet, because the other registered on Tuesday, the second would get priority, although both registered within the seven days allowed by the Act for doing so. Therefore there would be no default in following the statute by the first person, and yet the second, assuming him even to be bonâ fide, would take priority. It might be carried further by supposing the first bill of sale granted on Monday and the second on Tuesday, and the second registered on Tuesday, and the first grantee took possession on Wednesday, having still four days in which to register, he would nevertheless find himself defeated by the second prior registered bill of sale. Further, there might be collusion between the grantor and the second grantee, and fraud not easy to discover, and also temptation—where there was no fraud on the part of the grantee—to fraud on the part of the grantor, who is generally a person in need, and who might have the opportunity of getting paid twice for the

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same goods by cleverly committing frauds. Some hardships were put on the other side; without going into them, I may say that there is no such manifest extreme hardship as to induce us to construe the section against the grammatical construction of the words, or against the sense and object of the statute as explained in *Davis* v. *Goodman*. (1) The next, and perhaps strongest, argument that could be urged against our construction—and I do not say the argument is not a powerful one—is that if the clause be not applied as the defendant asks, what is the object of the provision? It is always difficult to answer such a question, unless we know the previous history of the legislation. Probably this provision, as in so many other instances, was framed to meet a particular decided case. An abuse is found out, and the legislature puts a patch on the sore, and leaves all other sores until they pain. But the clause may have been put in to induce parties to register. The old Bills of Sale Act left room for great abuses; persons would keep a secret bill of sale running, which during the twenty-one days then allowed for registration was valid, and before the end of that period was renewed from time to time, so as to defeat the object of the Act, as was decided in the Exchequer Chamber, which held that the parties had successfully evaded the statute by such means. That is partly provided against by s. 9. The provision for priority may be intended to induce persons to register bills of sale at once, and so secure the grantor safety. Another reason—it may enable sheriff's officers and trustees in bankruptcy to ascertain at once which of two claimants under bills of sale has the prior claim, especially as regards sheriff's officers—and, so far as they are concerned, they have only to look at registered bills of sale, and have nothing to do with unregistered ones, which are fraudulent and void as against them. It may be that these reasons, if the fair construction of the terms of the provision were the other way, are not strong enough to warrant us in departing from them. But the fair construction being evidently in favour of our view, and having regard to the scope and provisions of the Act, I think those reasons enough. I think that there can be no doubt that the intention and object of the Act of Parliament is to cause registration, and to give a deed registered a different

(1) 5 C. P. D. 128.

character to that of an unregistered deed, but only in the particular cases specified in s. 8; in other respects registration is unnecessary. Deeds are valid conveyances at law, they give title at law; and more particularly in this case, where under a deed perfectly bonâ fide, so far as we know, possession was taken. I think the priority of the deed—at all events coupled with possession taken of the goods—gave the defendant priority, and therefore that he is entitled to our judgment.

LINDLEY, J. I am of the same opinion. The question is new, and of great importance, and shortly is whether the priority clause in s. 10 of the Bills of Sale Act was intended to alter the priorities which existed between registered and unregistered bills of sale under all circumstances, or whether it is confined to cases where bankruptcy or execution or something of that kind described in s. 8 happens. Now the words taken alone are such that I think they might be construed either way, supposing there were no context and no à priori reasons for giving them one construction more than another. If looked at very critically and accurately they seem to apply to registered bills of sale only; but supposing there was nothing more, I should hesitate to say this was all that was meant. We must, however, look not only at those words, but at the whole Act; and I took time for the purpose of reading it through and seeing, if I could, whether the other sections favoured one side or the other, and of looking into the authorities. I have done so, and my conclusion from careful study of the Act and, of course, of the judgment of the Court of Appeal in *Davis* v. *Goodman* (1), is that, unless the words of the provision now before us are so plain as to force us to some other decision, we ought to read the Act so as not to alter the law between holders of bills of sale, or grantors and grantees of bills of sale, except in cases within s. 8. The Act contains no preamble worth mentioning, only that "it is expedient to consolidate and amend the law relating to bills of sale of personal chattels." The Act of 1851 contained a long preamble which obviously did not contemplate an alteration in the priority of holders of bills of sale inter se, and there is nothing except the words under discussion in the Act of

(1) 5 C. P. D. 128.

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1878 tending to shew that it was meant to alter the general scope and drift of the Act of 1854, and the Court of Appeal have decided that that is the true mode of approaching the construction of s. 10 in the Act of 1878. When we see that that is the governing principle, it would be difficult, if not impossible, to give the clause now in question so wide a construction as might be given if we approached it from a different point of view; and when the other provisions are looked at we seem to be right in our construction. The clause does undoubtedly affect the priorities of bill of sale holders. It is applicable to them and does not affect the question between the bill of sale holder and the execution creditor or trustee in bankruptcy. That is governed by s. 8. What had been decided before this with respect to those priorities? There are decisions—some since the Act, some before it—to which I will call attention. There have been cases of priorities between holders of registered and unregistered bills of sale. In the first class, possession of the goods was not taken by the holder of the unregistered bill of sale, in the second class possession was taken by him. In *Richards* v. *James* (1) first there was an unregistered bill of sale, then a registered bill of sale, and then execution, and the question was what were the priorities? The decision was that the registered bill of sale had priority, then came the execution creditor, and last the unregistered bill of sale. There there was no seizure by the grantee of the first. Then came in the same state of circumstances a question in Chancery, and indirectly at law, whether the execution creditor could not stand in the place of the unregistered bill of sale holder so as to claim priority over a registered bill of sale holder; and that was negatived. *Ex parte Payne, In re Cross* (2); and *Edwards* v. *English.* (3) The next question arose in *In re Barrand. Ex parte Cochrane.* (4) The order of date was this: first, unregistered bill of sale; secondly, registered bill of sale; thirdly, seizure by holder of the unregistered bill of sale; and fourthly, liquidation—that is to say the order of date was the same as here with the addition of liquidation. The priority was this: first, the holder of the unregistered bill of sale who had seized; secondly, the registered bill of sale holder; and lastly,

(1) Law Rep. 2 Q. B. 285.
(2) 11 Ch. D. 539.
(3) 7 E. & B. 564.
(4) 3 Ch. D. 324; 4 Ch. D. 23.

came the trustee under the liquidation. That is an important decision, because we are asked here to declare that the registered bill of sale has priority where there is no bankruptcy. To do so would be introducing an anomaly which we should not be justified in introducing. For these reasons, it appears to me that the view taken by the county court judge was right, and that the rule should discharged with costs.

Rule discharged with costs. (1)

Solicitors for plaintiff: *Park, Nelson, & Co.*
Solicitors for defendant: *Aldridge, Thorn, & Morris.*

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March 18.

Q. B. D.

Landlord and Tenant—Fraudulent Removal of Goods—11 *Geo.* 2, *c.* 19, *ss.* 4, 5; 12 *&* 13 *Vict. c.* 45, *s.* 1; 42 *&* 43 *Vict. c.* 49, *s.* 31, *sub-s.* 2, *s.* 32.

An appeal from an order of justices under 11 Geo. 2, c. 19, ss. 4, 5, by a person adjudged guilty of fraudulently removing goods to prevent a distress, is subject to the conditions and regulations prescribed in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2, and s. 32, and therefore notice of appeal must be given within seven days after the decision appealed against.

RULE calling on the justices for Shropshire to shew cause why a mandamus should not issue, commanding them to enter continuances and hear an appeal by E. Weston against a conviction under 11 Geo. 2, c. 19.

On the 29th of October, 1880, Weston was charged before justices in petty sessions under 11 Geo. 2, c. 19, s. 4, with fraudulently removing his goods to avoid a distress for rent. He was found guilty and ordered to pay 24*l.* On the 2nd of November he paid the money. On the 18th of December he gave notice of appeal, which was served on the two justices and the complainant, his landlord. On the 28th of December recognizances were entered into. On the 3rd of January, 1881, the next general quarter sessions were held, and the appellant attended them to prosecute the appeal; but the Sessions were of opinion that 42 & 43 Vict. c. 49, applied, and notice of appeal not having been given within seven days as provided by s. 31 they dismissed the appeal.

(1) But see *Conelly* v. *Steer*, Weekly Notes, p. 46, 26 March, 1881.

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M'Clymont, shewed cause. The Act 11 Geo. 2, c. 19, under which the appellant was convicted gives him an unconditional right of appeal: s. 5. By 12 & 13 Vict. c. 45, s. 1, regulating the procedure in quarter sessions, fourteen days' clear notice of appeal shall be given in writing signed by the person giving it; and it shall specify the grounds of appeal. But that section is now repealed in so far as it applies to appeals under Acts which simply authorize appeal without prescribing regulations and conditions; for by 42 & 43 Vict. c. 49, the Summary Jurisdiction Act, 1879, s. 31, when any person is authorized by this Act, or by any future Act, to appeal from a conviction to quarter sessions he may appeal subject to certain conditions and regulations prescribed in the sub-sections. By s. 32, when he is "authorized by any past Act" to appeal he may do so "subject to the conditions and regulations contained in this Act" with respect to such an appeal: "Provided that where any such appeal is in accordance with the conditions and regulations prescribed by the Act authorizing the appeal, so far as the same is unrepealed, such appeal shall not be deemed invalid by reason only that it is not in accordance with the conditions and regulations contained in this Act." No conditions and regulations are prescribed by the Act authorizing this appeal, viz., 11 Geo. 2, c. 19, s. 5. Therefore this appeal must be subject to the conditions and regulations prescribed in the Summary Jurisdiction Act, s. 31, sub-s. 1–7. By sub-s. 2 "the appellant shall, within the prescribed time, or if no time is prescribed within seven days after the day on which the decision of the Court was given" give notice in writing of his intention to appeal and of the general grounds of such appeal. Here the notice was not given until eighteen days afterwards, and was therefore too late. 12 & 13 Vict. c. 45, s. 1, is impliedly repealed by the Summary Jurisdiction Act, 1879, s. 32, as both profess to deal with time of appeal and they are inconsistent: *Garnett* v. *Bradley*. (1)

Kemp, Q.C. (*Redman*, with him), in support of the rule. By the Act 11 Geo. 2, c. 19, ss. 5, 6, no particular notice of appeal is required. But the general statute governing the procedure of quarter sessions, 12 & 13 Vict. c. 45, s. 1, prescribes fourteen days' notice. That section is unrepealed. 42 & 43 Vict. c. 49, instead

(1) 3 App. Cas. 944, at p. 966.

of repealing it affirms it. The appellant being authorized by a past Act to appeal may appeal subject to the conditions and regulations in this Act; but he may, if he choose, use the old procedure. He has done so here, and having given fourteen days' notice and recognizance, was entitled to be heard at quarter sessions on his appeal.

GROVE, J. The offence committed is within 11 Geo. 2, c. 19. By s. 5 an appeal from the order of justices to the next general quarter sessions is allowed. In that section no condition is prescribed; but by s. 6 the appellant must give recognizances. That is, however, to enable the justices to stay execution, it is no condition of appeal; the appellant has his appeal as of right. 12 & 13 Vict. c. 45, s. 1, requires fourteen days' notice; that provision would doubtless apply to 11 Geo. 2, c. 19. The Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, enacts that "where any person is authorized by this Act, or by any future Act, to appeal from the conviction or order of a court of summary jurisdiction to a court of general or quarter sessions, he may appeal to such court, subject to the conditions and regulations following":—So far that provision is general. New regulations are substituted which are different from and in addition to those of 12 & 13 Vict. c. 45, and comprise under sub-s. 2 a provision for notice within seven days after the decision appealed from, and other conditions which, as is admitted, have not been performed in the present case, and therefore the appellant has not complied with that Act of Parliament. Sect. 32 does not repeal 12 & 13 Vict. c. 45, absolutely. Sect. 32 is, that "where a person is authorized by any past Act to appeal . . . to a court of general or quarter sessions, he may appeal to such court subject to the conditions and regulations contained in this Act with respect to an appeal to a court of general or quarter sessions." Therefore he has a power of appealing as of right, for it is authorized by a past Act, but subject to the conditions contained in this Act. Then comes the provision on which the whole question turns: "provided that where any such appeal is in accordance with the conditions and regulations prescribed by the Act authorizing the appeal, so far as the same is unrepealed, such

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appeal shall not be deemed invalid by reason only that it is not in accordance with the conditions and regulations contained in this Act." This appeal cannot be "in accordance with the conditions and regulations contained in the Act" authorizing the appeal, because that Act prescribes no conditions or regulations. So there being none in that Act, if this were not a case within 42 & 43 Vict. c. 49, the appellant would be without conditions at all. The "past Act" is that by which the appeal is authorized, viz., 11 Geo. 2, c. 19. The conditions of 42 & 43 Vict. c. 49, s. 31, not having been complied with, the justices were right in disallowing the appeal.

LINDLEY, J. I am of the same opinion. The argument of Mr. Kemp is disposed of by the terms of s. 32. Two classes of past Acts are referred to in that section, the one giving a right of appeal simply; another giving a right of appeal under some conditions and regulations. The Act giving the right of appeal in this case is 11 Geo. 2, c. 19, which comes into the first of the classes mentioned; so we must turn back to s. 31, which,—not in terms but by force of the words in s. 32,—relates to appeals under that class of past Acts; but the conditions in s. 31 have not been complied with. As to the implied repeal of 12 & 13 Vict. c. 45, s. 1, I see no inconsistency between the two Acts. The 12 & 13 Vict. c. 45, requires that fourteen days' notice of appeal shall be given; 42 & 43 Vict. c. 49, s. 31, sub-s. 2, that notice shall be given within seven days after the decision appealed from.

Rule discharged.

Solicitors for plaintiff: *Shaen, Roscoe, Massey, & Shaen.*
Solicitors for defendants: *Horne, Hunter, & Birkett.*

ROLFE, APPELLANT; HYDE & CO., RESPONDENTS. 1881

Revenue—Inhabited House Duty—Exemption—"Servant or other Person"—41 Vict. c. 15, s. 13, part 2. *March 23.* Q. B. D.

The respondents, wholesale clothiers, were possessed of premises the whole of which were used as warehouses and counting-houses, except a sitting-room and bedroom on the top storey occupied by their cashier, who had a salary of 200*l.* a year, and who slept on the premises solely as caretaker and for their protection, this being considered as part of his duty:—

Held, that the Income Tax Commissioners were warranted in finding that the cashier was "a servant or other person" within 40 Vict. c. 15, s. 13, part 2, and that the premises were accordingly exempt from house duty.

Yewens v. *Noakes* (6 Q. B. D. 530) explained.

CASE stated under 37 & 38 Vict. c. 16.

Mr. R. P. Hookham, as trustee of the respondents, wholesale clothiers, appealed against an assessment to the inhabited house duties for the year ending the 5th of April, 1879, in respect of new warehouses, 31 and 32, Queen Street, Oxford, and claimed exemption under sub-s. 2 of clause 13, 41 Vict. c. 15. (1)

The appellant stated that the whole of the premises in question were used as warehouses and counting-houses, with the exception of a sitting-room and a bedroom on the top storey occupied by the cashier of the firm, who sleeps on the premises solely as caretaker and for the protection thereof, that being considered as a part of his duty. He also stated that a woman attends to his domestic wants, as also to those of the other clerks and warehousemen, during the day, but does not remain in the premises at night.

The surveyor of taxes submitted that a person holding the responsible position of cashier and in receipt of a salary of 200*l.* per annum, could not be deemed to be such a "servant or other person" within the meaning of the Act as may dwell on the premises as caretaker and for the protection thereof, and bring them within the exemption granted by s. 13, part 2, 41 Vict. c. 15.

The commissioners discharged the assessment on the ground

(1) 41 Vict. c. 15, s. 13 (2): "Every house or tenement which is occupied solely for the purposes of any trade or business shall be exempted from the duties by the commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

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that they were of opinion that the cashier was a "servant or other person" who dwelt only for the purpose of protection.

A. V. Dicey, for the appellant. The cashier was not "a servant or other person" within the meaning of the exception in 41 Vict. c. 15, s. 13. The earlier Acts, 48 Geo. 3, c. 55 and 6 Geo. 4, c. 7, s. 7, provided for an exemption from duty in the case of houses unoccupied except by a caretaker; the later Act authorizing the commissioners to grant a licence for the occupier to appoint one of his servants, named in the licence, as caretaker, but not authorizing the servant to inhabit the building as "a place of residence." Then came the Act 32 & 33 Vict. c. 14, s. 11, which is in pari materia with 41 Vict. c. 15, maintaining the exemption although a servant or other person might dwell in the tenement for its protection. Reading 41 Vict. c. 15, s. 13, part 2, with reference to the previous Acts, it is obvious that the "servant or other person" contemplated is an actual servant of the occupier. The legislature intended that there should not be a double exemption from duty by allowing a person who would otherwise occupy premises for which duty would be payable to escape liability. The present case is, however, substantially decided by *Yewens* v. *Noakes* (1), where a clerk employed at a salary of 150*l.* a year lived in trade premises with his wife, children, and servant for the purpose of taking care of them; and it was held by the Court of Appeal that the clerk was not "a servant or other person" within the exemption in 32 & 33 Vict. c. 14, s. 11, Thesiger, L.J. (2), expressing his opinion that these words applied only to an ordinary menial or domestic servant.

[MATHEW, J. Is a policeman who occupies premises as a caretaker to be considered as a domestic servant?]

He performs the duties of a servant, but the cashier does not live in the house solely for the purpose of protecting it. If not there he would live in premises liable to duty.

Bosanquet, for the respondents. The decision of the commissioners was right. The words "servant or other person" must mean something more than an ordinary domestic servant. *Yewens* v. *Noakes* (1) is really in the respondents' favour. There the

(1) 6 Q. B. D. 530. (2) 6 Q. B. D. 530, at p. 537.

exemption was overruled because the caretaker had made the premises the dwelling-place of himself, his family, and servant; but Thesiger, L.J., says that if the commissioners had decided the point as a question of fact without submitting it to the Court, there would be no ground for interfering with their decision. Here the commissioners have given their decision.

Dicey, in reply. The commissioners decided the matter as a question of law, and not as a question of fact.

LINDLEY, J. I am of opinion that we ought not to disturb the finding of the commissioners. The question turns upon the construction of s. 13, part 2, of the Customs and Inland Revenue Act, 1878 (41 Vict. c. 15), by which every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood or profit, is exempted from duty, and this exemption is to take effect although a servant or other person may dwell in such house for its protection. How far, then, does the meaning of this term "servant" extend? In the present case the commissioners were of opinion that the cashier was a servant within the meaning of the exemption, and we are invited on the part of the Crown to decide that a cashier cannot be such a servant as is mentioned in the section. In the absence of any statutory definition governing the case, I have the greatest difficulty in going that length. Reliance has been placed on the judgment in *Yewens* v. *Noakes* (1), but I do not think that it is any authority against the exemption which is now claimed. I am not prepared to say what my decision would be if the opinion of the commissioners were not before me, but I think the facts are wholly different from those in *Yewens* v. *Noakes*. (1) There the clerk lived in the house with his wife, children, and servant, and Thesiger, L.J., says: "The present is not upon the facts stated to us by the commissioners, the case of an ordinary caretaker, but of a man who occupies with his wife and family a considerable portion of the sitting-rooms and bedrooms of the dwelling, and occupies them not merely with his wife and family, but with a servant, for the purpose of attending upon him and his family." Further on the Lord Justice says that

(1) 6 Q. B. D. 530.

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there is another ground for allowing the appeal that the legislature, in using the term servant, uses it in its ordinary and popular sense as a menial or domestic servant. But this opinion is extra judicial, and he further says that, with reference to the difficulty which there must be of drawing the line between cases under the Act, the commissioners must decide the point, and if they had found as a fact that the caretaker was a servant the Court would not be justified in interfering. I think that this is a case in which the commissioners have drawn the line, and that their decision must stand.

WATKIN WILLIAMS, J. I am of the same opinion. The only question of law in this case is, whether the cashier can be, or, in other words, whether it was competent for the commissioners to find that he was, a caretaker within the meaning of the exception. I think we must answer this question in the affirmative.

MATHEW, J., concurred.

Judgment for the respondents.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Lovell, Son, & Pitford.*

April 6.

(C. A.)
Q. B. D.

[IN THE COURT OF APPEAL.]

HORNE *v.* HUGHES.

Bill of Sale—Transfer—Assignment—Bills of Sale Act, 1878 (41 & 42 *Vict.* c. 31), *ss.* 8, 10.

A bill of sale of goods, which was duly registered, was given to secure 500*l.* with interest, part of which was at a subsequent date paid off. A deed was afterwards made between the two parties to the bill of sale, and the plaintiff, whereby the security was transferred and the goods assigned to him, on his paying off the amount remaining due on the bill of sale and making a further advance to the grantor, the whole amount secured by this deed being 501*l.* 15*s.* 9*d.*, with interest, and the rate of interest and the times of payment being different from those of the former deed:—

Held (by Watkin Williams and Mathew, JJ.), that this deed was a transfer and not a new bill of sale, and need not be registered under the Bills of Sale Act,

1878, to be effectual as to the whole amount secured by it, against an execution creditor.

Held, by the Court of Appeal (Bramwell, Baggallay, and Lush, L.JJ.), that whether or not the deed was an effectual security, without registration, for the fresh advance, it was, as to the amount which remained due on the former bill of sale, a transfer and valid to that extent without registration under the Bills of Sale Act, 1878, so as to entitle the plaintiff to the goods.

SPECIAL CASE, from which the following facts appeared.

1. The sheriff of Middlesex seized certain scheduled goods in the possession of Edward Rawson Clark, under a writ of fi. fa., issued at the suit of Thomas Hughes the defendant, against Edward Rawson Clark, and the same were claimed by William Horne, the plaintiff.

2. An interpleader summons was taken out, and it was ordered that the question of law arising upon the claim should be determined by special case.

3. On the 26th of July, 1877, Edward Rawson Clark by deed, mortgaged his household goods and effects to the Real and Personal Advance Company, Limited, for securing the sum of 500*l.* This deed was duly registered at the Bills of Sale office. The indenture (1) was made between Edwin Stanley Clark of the first part, Edward Rawson Clark, the mortgagor, of the second part, and the Real and Personal Advance Company, Limited, the mortgagees, of the third part. It recited, among other things, an indenture of the 19th of June, 1877, by which certain goods the property of Edward Rawson Clark, were mortgaged by him to Edwin Stanley Clark, and that this indenture was duly registered as a bill of sale; that the mortgagor had applied to the mortgagees to lend him 500*l.*, and that Edwin Stanley Clark had agreed to postpone his security; and witnessed that in pursuance of such agreement, and in consideration of the sum of 500*l.* then paid by the mortgagees to the mortgagor, Edward Rawson Clark covenanted with the mortgagees to pay to them on the 26th of October then next the principal sum of 500*l.* and if it or any part should remain unpaid on the 26th of October thenceforth to pay interest at 20 per cent. per annum on the fourth Wednesday in every third month, and further, that for the consideration aforesaid, Edwin

(1) This, and the other two deeds were set out at length in an appendix to the case.

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Stanley Clark assigned, and the mortgagor assigned and confirmed, unto the mortgagees all the goods mentioned and described in the schedule or inventory thereto, subject to a proviso for redemption.

4. On the 26th of February, 1878, the Real and Personal Advance Company, Limited, by the direction of Edward Rawson Clark, by deed transferred the mortgage to one Joseph Clarke, and this transfer was duly filed. The indenture was made between the Company, of the first part, Edward Rawson Clark, of the second part, and Joseph Clarke, of the third part; and after reciting the indenture of the 26th of July, 1877, and that the 500*l.* was still due, witnessed that in consideration of 500*l.* to the Company paid by Joseph Clarke at or immediately before the execution thereof, the Company, granted, bargained, sold, assigned, transferred, and set over to Joseph Clarke the principal sum of 500*l.* owing by the thereinbefore recited mortgage, and all their interest therein, and all rights, powers, and remedies for the recovery and enforcing payment thereof; and for the consideration aforesaid, the Company granted, bargained, sold, assigned, transferred, and set over, and Edward Rawson Clark granted, bargained, assigned, transferred, ratified, and set over to Joseph Clarke all the goods assigned by the deed of the 26th of July, 1877, to the Company, subject to the equity of redemption then subsisting, under and by virtue of the indenture of the 26th of July, 1877, and subject also to the indenture of mortgage of the 19th of June, 1877, in favour of Edwin Stanley Clark. The deed contained a covenant by Edward Rawson Clark to pay the sum of 500*l.* on demand, and interest at the rate of 10 per cent. per annum, by equal half yearly payments on the 26th of August and the 26th of February in every year, the first of such payments to be made on the 26th of August then next ensuing.

5. On the 20th of February, 1880, Joseph Clarke, Edwin Stanley Clark, and Edward Rawson Clark executed a deed disposing of their interests to the plaintiff, William Horne. This indenture was made between Joseph Clarke, of the first part, Edwin Stanley Clark, of the second part, Edward Rawson Clark, of the third part, and William Horne, of the fourth part. It recited the indenture of the 26th of July, 1877, and that of the

26th of February, 1878, and that Joseph Clarke claimed that there was owing to him by virtue of these indentures 318*l.* 10*s.* 2*d.* for principal, 12*l.* 7*s.* 2*d.* for interest, and 17*l.* 10*s.* for costs, making in all the sum of 348*l.* 7*s.* 4*d.*; that Edward Rawson Clark had requested William Horne to pay off the same and take a transfer of the securities vested in Joseph Clarke; that William Horne had advanced to Edward Rawson Clark the sum of 113*l.*, and had agreed to advance the sum of 348*l.* 7*s.* 4*d.* for the purpose of paying off Joseph Clarke, on having the repayment of the sums of 113*l.*, 348*l.* 7*s.* 4*d.*, and 40*l.* 8*s.* 5*d.* for costs, amounting together to 501*l.* 15*s.* 9*d.*, and interest thereon, secured as hereinafter mentioned, and witnessed that in pursuance of the agreement, and in consideration of the sum of 113*l.* so due and owing by Edward Rawson Clark to William Horne, and of the sum of 348*l.* 7*s.* 4*d.* then paid by William Horne to Joseph Clarke at the request of Edwin Stanley Clark and Edward Rawson Clark, and also in consideration of 40*l.* 8*s.* 5*d.* then advanced by William Horne for the payment of costs, Joseph Clarke, with the consent of Edwin Stanley Clark and Edward Rawson Clark, bargained, sold, transferred, assigned, and set over the principal sum of 348*l.* 7*s.* 4*d.* then owing to Joseph Clarke by virtue of the indentures of the 26th of July, 1877, and the 26th of February, 1878, and all the interest thenceforth to accrue and become payable under or by virtue of those indentures, or either of them, and all rights and remedies for the recovery thereof; and that, in further pursuance of the agreement and for the consideration aforesaid, Joseph Clarke, with the consent of Edwin Stanley Clark and Edward Rawson Clark, granted, bargained, sold, assigned, transferred, and set over, and Edwin Stanley Clark and Edward Rawson Clark granted, assigned, and confirmed unto William Horne the goods mentioned and described in the schedule or inventory to the indenture of the 26th of July, 1877, subject to a proviso for redemption on payment of 501*l.* 15*s.* 9*d.*, on demand, or on the 31st of July then next, and interest at 10 per cent. per annum, and with a covenant to pay the principal sum of 501*l.* 15*s.* 9*d.* on demand or on the 31st of July then next, whichever should first happen, and interest at the rate aforesaid to be computed from the date of the deed. A memorandum was

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attached to the deed by which payment was not to be demanded until the 20th of February, 1881, if Edward Rawson Clark should regularly pay interest by equal quarterly payments, unless he should allow a distress or execution to be levied on the goods or commit an act of bankruptcy or do any act whereby his interest in any of the articles might become charged.

6. The execution by Edward Rawson Clark of the deed dated the 20th of February, 1880, was attested by a solicitor of the Supreme Court, who also witnessed the signature of Joseph Clarke. A true copy of the deed and of the attestation of the execution of the same, together with the affidavit by the solicitor required by s. 10 of the Bills of Sale Act, were duly filed with the registrar appointed under the Act.

7. There was no attestation by a solicitor of the Supreme Court to the execution of the deed by Edwin Stanley Clark, nor was there any description in the deed of the residence and occupation of the attesting witness to his signature.

8. No affidavit containing a description of the residence and occupation of Edwin Stanley Clark, or of Joseph Clarke, or of the residence and occupation of the attesting witnesses to the signatures of Edwin Stanley Clark and Joseph Clarke respectively, was filed with the registrar appointed under the Bills of Sale Act, 1878.

9. The deed of the 20th of February, 1880, refers to a certain schedule or inventory to the deed dated the 26th of July 1877, but neither such schedule or inventory, nor a true copy thereof, were presented to or filed with the registrar within seven clear days of the making or giving or execution of the deed of the 20th of February, 1880.

The question for the Court was whether the claimant was entitled to the goods as against the execution creditor.

March 15. *Charles, Q.C.* (*H. D. Greene,* with him), for the plaintiff, contended that the deed of the 20th of February, 1880, was a transfer of a registered bill of sale within s. 10 of the Bills of Sale Act, 1878, and therefore need not be registered. The registration of a deed is intended to give notice that the property in the goods has passed. The maximum amount secured by the

mortgage was substantially unaltered by the transfer, so that other creditors of the mortgagor could not be prejudiced by it. He then argued that if the deed was a bill of sale it was duly registered, since the provisions with regard to attestation and explanation could not apply to every party to the deed but only to the grantor, and in his case the Act had been complied with, and further that the registration of the schedule was unnecessary under the circumstances as it was already on the file.

Edward Pollock, for the defendant, contended that by a transfer was intended merely a handing over of the same security from one person to another, and that here there were substantial variations, and among other things an alteration of the amount secured, the plaintiff getting security for the sums of 113*l.* and 40*l.*, over and above the sum at that time secured by the prior bill of sale. He also contended that the registration was insufficient.

Charles, Q.C., was heard in reply.

Cur. adv. vult.

March 16. The judgment of the Court (Watkin Williams and Mathew, JJ.), was delivered by

WATKIN WILLIAMS, J. This is an interpleader proceeding in which the plaintiff claims certain goods seized by the Sheriff of Middlesex under a writ of fi. fa. issued at the suit of the defendant Hughes in December, 1880, against one Edward Rawson Clark. The question in the case is whether a bill of sale of the goods from Edward Rawson Clark to the plaintiff dated the 20th of February, 1880, under which the plaintiff claims, is void by reason of non-compliance with the provisions of the Bills of Sale Act, 1878.

The material facts are these:—On the 26th of July, 1877, Edward Rawson Clark by deed assigned by way of mortgage certain goods and chattels to the Real and Personal Advance Company, Limited, for securing a loan of 500*l.* and interest at the rate of 20 per cent. per annum. This instrument was duly registered as a bill of sale according to law.

On the 26th of February, 1878, the Real and Personal Advance Company, Limited, by the direction of Edward Rawson Clark, transferred this mortgage by deed to one Joseph Clarke, who then

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in consideration of an advance by him to Edward Rawson Clark of the sum of 500*l.*, became transferee and mortgagee of the goods and chattels by way of security for the repayment of the said sum of 500*l.*, together with interest at the rate of 10 per cent. per annum.

On the 20th of February, 1880, the mortgage debt had become reduced, so that there remained due only the sum of 348*l.* 7*s.* 4*d.*, and Joseph Clarke desiring to be wholly paid off, applied to the claimant Horne to advance the necessary funds and take a transfer of the securities. Horne consented to do so, and at the same time at the request of the mortgagor consented to advance him a further sum, which with the expenses would bring up the amount then advanced by Horne substantially to the same amount as that originally secured by the bill of sale. Accordingly, on the 20th of February, 1880, the deed or bill of sale in question was entered into between the mortgagor Edward Rawson Clark, the mortgagee Joseph Clarke, and the claimant Horne the transferee of the mortgage, whereby after reciting all the foregoing facts and that Horne had made the promised advances to about 500*l.*, Joseph Clarke and Edward Rawson Clark granted and assigned to Horne all the goods and chattels by way of mortgage and security to Horne for the total sums of money so advanced by him together with interest at 10 per cent. per annum. The goods comprised in these deeds were seized under the writ of fi. fa. issued at the suit of the defendant against Edward Rawson Clark, and the question in this interpleader is whether the plaintiff's title under the deed is good as against the defendant.

The defendant raised several objections to the validity of the plaintiff's title; he contended that the deed of the 20th of February, 1880, being a bill of sale within the meaning of the 4th section of the Bills of Sale Act, 1878, was not duly registered according to the provisions of that statute, and was accordingly void as against him. To these objections the plaintiff replied: 1st. That the Bill of Sale did not require registration because it was a transfer or assignment of a registered bill of sale which is expressly excepted from the Act by s. 10, which enacts that "A transfer or assignment of a registered bill of sale need not be registered." 2ndly. He contended that it was in fact duly and sufficiently registered as a bill of sale.

If the plaintiff's first contention be correct the further questions do not arise. In our opinion the plaintiff's first contention is correct, and for the following reasons.

The original duly registered bill of sale was given as a security for the repayment of an advance of 500*l.*, together with interest at the rate of 20 per cent. per annum, and was intended to remain and be a security so long as the 500*l.* and interest, or any part thereof, was due and unpaid, and if the state of accounts between the mortgagor and mortgagee in relation to the advance so secured had fluctuated from time to time, there can be no doubt that the mortgage would have subsisted as a security for the sum due at any given time on that account until the whole had been finally paid off.

This mortgage was duly transferred by the original mortgagees to Joseph Clarke, who advanced the necessary money to pay them off. Joseph Clarke, therefore, as the transferee and mortgagee of the goods held them upon precisely the same terms and with the same rights as the original mortgagees, and although the amount of his advance was at one time reduced to 348*l.*, there can be no doubt that if he had allowed it again to be increased, either by arrears or interest or by another advance to the maximum sum of 500*l.*, the security would have been valid and effectual for that sum.

In this position of affairs Joseph Clarke, being desirous of being paid off, applied to Horne to take his place and take a transfer of the security. Horne consented to do so, and at the same time to make up the advance once more to the maximum amount secured by the bill of sale.

This appears to us to be in substance, as well as in strict form, a transfer of the bill of sale within the meaning of s. 10 of the Act. Had it been attempted under the colour of a transfer and assignment of the existing mortgage to have extended the security and to have made it available for a larger advance than that for which the original mortgage had been given, such a transaction would not, in our opinion, have been a transfer of a duly registered bill of sale within the meaning of the 10th section of the Act, but substantially a new bill of sale which would have required registration under the Act.

The defendant appealed.

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April 6. *Edward Pollock*, for the defendant. The parties have chosen, instead of transferring the former security and getting a fresh bill of sale to cover the new advance, to deal with both matters in one deed, and that deed cannot be a transfer such as is contemplated by the Act. Not only is there a sum added to the security above the amount remaining due on it, but the rate of interest is different on the deeds of the 26th of July, 1877, and the 20th of February, 1880, and the times and conditions of payment of principal and interest are also different. *Barham* v. *Earl of Thanet* (1) shews that a transfer with a new advance under such circumstances as these would not be considered as a mere assignment of the old mortgage.

Maurice Powell (*Charles, Q.C.*, with him), for the plaintiff, was not called on.

THE COURT (Bramwell, Baggallay, and Lush, L.JJ.) were of opinion that the effect of the deed was to transfer the former security for 348*l.* 7*s.* 4*d.* on it, and that such a transfer being valid without registration the plaintiff was entitled to the goods, and that it was not necessary to determine whether he had a right to hold them as security for any larger sum than 348*l.* 7*s.* 4*d.*, since he was at all events entitled to hold them as security for that sum.

Judgment for the plaintiff.

Solicitor for plaintiff: *S. S. Seal.*

Solicitors for defendant: *Bower & Cotton.*

(1) 3 M. & K. 607.

HYMAN AND WIFE *v.* NYE & SONS.

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April 4.
Q. B. D.

Negligence—Jobmaster—Defect in Carriage—Warranty of fitness.

The plaintiff hired from the defendant, a jobmaster, for a specified journey, a carriage, a pair of horses, and a driver. During the journey a bolt in the under-part of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset, and the plaintiff injured. In an action against the defendant for negligence, the jury were directed that, if in their opinion the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. The jury found a verdict for the defendant, and in particular that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention:—

Held, that the direction was wrong, for that it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it, and the evidence was not such as to shew that the breakage of the bolt was, in the proper sense of the word, an accident not preventible by any care or skill, or to warrant the finding of the jury that the carriage was reasonably fit for the purpose for which it was hired.

STATEMENT OF CLAIM—that defendant was a jobmaster, carrying on business at Brighton, and that the plaintiff was lawfully travelling in and using a carriage of the defendant in the custody and care of the defendant's servant, when, through the negligence and default, or through the want of care and skill of the defendant, the carriage was upset and the plaintiff thrown from it and injured.—

Defence denying the negligence. Joinder of issue.

At the trial before Hawkins, J., at the Middlesex sittings in July, 1880, there was a verdict for the defendant.

A rule having been obtained calling upon the defendant to shew case why there should not be a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence,

Sir J. Holker, Q.C., and *Petheram, Q.C.*, shewed cause.

Houghton (*Sir H. Giffard, Q.C*, and *Willis, Q.C.*, with him), supported the rule.

Cur. adv. vult.

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The facts and arguments sufficiently appear in the judgment of Lindley, J.

April 4. The following judgments were delivered:—

LINDLEY, J. The defendant in this case was a job-master at Brighton, letting out carriages and horses for hire. The plaintiff hired of him a landau, and a pair of horses, and a driver, for a drive from Brighton to Shoreham and back. After having driven some way, and whilst the carriage was going down hill and slowly over a newly mended part of the road, a bolt in the underpart of the carriage broke. The splinter-bar became displaced; the horses started off; the carriage was upset; the plaintiff was thrown out and injured, and he brought this action for compensation.

It was proved at the trial that no fault could be imputed to the horses nor to the driver; and although the plaintiff was charged with having caused the accident by pulling the reins, the jury found in the plaintiff's favour on this point, and nothing now turns upon it.

It further appeared that the carriage had been built by a good builder some eight or nine years before the accident; had been repaired by a competent person about fifteen months before it; that the defendant had no reason to suppose that there was any defect in the carriage or in any of its bolts; and that the defect, if any, in the bolt which broke could not have been discovered by any ordinary inspection. The bolt itself was not produced at the trial, and the nature of the defect, if any, in it when the carriage started was not proved.

The learned judge at the trial told the jury in substance that the plaintiff was bound to prove that the injury which he had sustained was caused by the negligence of the defendant; and if in their opinion the defendant took all reasonable care to provide a fit and proper carriage their verdict ought to be for him. Being thus directed, the jury found a verdict for the defendant; and in particular they found that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention. The plaintiff complains of this direction, and

of the verdict founded upon it, and we have to consider whether the direction was correct.

The substance of the complaint against the direction to the jury is that it was too favourable to the defendant, inasmuch as the judge did not sufficiently explain the degree of care which the defendant was bound to take, and the jury were led to believe that the defendant was not liable for defects of which he knew nothing, and which were not discoverable by him by ordinary care and attention. The plaintiff also contends that the breaking of the bolt, under no unusual strain, rendered it incumbent on the defendant to shew that the carriage when sent out was fit for its journey, and that the verdict on this point was against the weight of evidence, especially as the broken bolt was not produced.

The questions thus raised are of considerable difficulty and importance, and have rendered it necessary to examine a great number of authorities. The most important are the following: *Christie* v. *Griggs* (1); *Bremner* v. *Williams* (2); *Sharp* v. *Grey* (3); *Readhead* v. *Midland Ry. Co.* (4); *Francis* v. *Cockrell* (5); *Fowler* v. *Lock* (6); *Searle* v. *Laverick* (7); *Kopitoff* v. *Wilson* (8); *Randall* v. *Newson* (9); Story on Bailments (§§ 498, 592).

A careful study of these authorities leads me to the conclusion that the learned judge at the trial put the duty of the defendant too low. A person who lets out carriages is not, in my opinion, responsible for all defects discoverable or not; he is not an insurer against all defects; nor is he bound to take more care than coach proprietors or railway companies who provide carriages for the public to travel in; but in my opinion, he is bound to take as much care as they; and although not an insurer against all defects, he is an insurer against all defects which care and skill can guard against. His duty appears to me to be to supply a carriage as fit for the purpose for which it is hired as care and skill can render it; and if whilst the carriage is being properly used for such purpose it breaks down, it becomes incumbent on the person who has let it

(1) 2 Camp. 80.
(2) 1 Car. & P. 414.
(3) 9 Bing. 457.
(4) Law Rep. 2 Q. B. 412.
(5) Law Rep. 5 Q. B. 184, 501.
(6) Law Rep. 7 C. P. 272; 9 ibid. 751, n.
(7) Law Rep. 9 Q. B. 122.
(8) 1 Q. B. D. 377.
(9) 2 Q. B. D. 102.

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out to shew that the break down was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in *Christie* v. *Griggs* (1), and as the railway company did in *Readhead* v. *Midland Ry. Co.* (2), he will not be liable; but no proof short of this will exonerate him. Nor does it appear to me to be at all unreasonable to exact such vigilance from a person who makes it his business to let out carriages for hire. As between him and the hirer the risk of defects in the carriage, so far as care and skill can avoid them, ought to be thrown on the owner of the carriage. The hirer trusts him to supply a fit and proper carriage; the lender has it in his power not only to see that it is in a proper state, and to keep it so, and thus protect himself from risk, but also to charge his customers enough to cover his expenses.

Such being, in my opinion, the law applicable to the case, it follows that the direction given to the jury did not go far enough, and that it was not sufficient, in order to exonerate the defendant from liability for him to prove that he did not know of any defect in the bolt; had no reason to suppose it was weak, and could not see that it was by an ordinary inspection of the carriage. It further follows that, in my opinion, the evidence was not such as to warrant the finding that the carriage was in a fit and proper state when it left the defendant's yard.

In many of the cases bearing on this subject, the expression "reasonably fit and proper" is used. This is a little ambiguous, and requires explanation. In a case like the present, a carriage to be reasonably fit and proper must be as fit and proper as care and skill can make it for use in a reasonable and proper manner, i.e., as fit and proper as care and skill can make it to carry a reasonable number of people, conducting themselves in a reasonable manner, and going at a reasonable pace on the journey for which the carriage was hired; or (if no journey was specified) along roads, or over ground reasonably fit for carriages. A carriage not fit and proper in this sense would not be reasonably fit and proper, and vice versâ. The expression "reasonably fit" denotes something short of absolutely fit; but in a case of this description the difference between the two expressions is not great.

(1) 2 Camp. 80.

(2) Law Rep. 2 Q. B. 412.

It was objected on the part of the defendant that the plaintiff had in his statement of claim based his case on negligence on the part of the defendant, and not on any breach of warranty express or implied, and consequently that the plaintiff could not recover in this action, at least, without amending. But the absence of such care as a person is by law bound to take is negligence; and whether the plaintiff sues the defendant in tort for negligence in not having supplied such a fit and proper carriage as he ought to have supplied, or whether the plaintiff sues him in contract for the breach of an implied warranty that the carriage was as fit and proper as it ought to have been, appears to me wholly immaterial. Upon this point I adopt the opinion of Baron Martin in *Francis* v. *Cockrell* (1), which is based upon and warranted by *Brown* v. *Boorman*. (2)

The plaintiff's pleadings would have been free from all objection if he had stated in his statement of claim that he hired the carriage of the defendant, and not merely that the plaintiff was lawfully in the carriage. But the defendant knew under what circumstances the plaintiff was lawfully in it; and there was no surprise or miscarriage of justice occasioned by the omission of the statement of the fact of hiring. It appears to me, therefore, that the plaintiff ought not to be precluded from recovering in this action as the pleadings stand, if the facts come out in his favour.

For the above reasons I am of opinion that there should be a new trial, and that the costs of the first trial, and of this rule, should abide the event.

MATHEW, J. The learned judge appears to have considered that the plaintiff by his pleadings, had undertaken to prove negligence, and to have told the jury that if they thought reasonable care and precaution had been taken by the defendant to ascertain that the carriage was safe, they might find that it was safe. In other words, the question whether the carriage was safe, was treated as if it were the same with the question whether the defendant might have reasonably believed it to be safe.

It appears to me that the question which the jury ought to

(1) Law Rep. 5 Q. B. 509. (2) 11 Cl. & Fin. 1.

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have been asked was, whether the carriage was, in fact, reasonably safe when it was hired by the plaintiff. The cases referred to by my Brother Lindley, seem to shew that there is no distinction in this respect between contracts for the sale and for the hire of an article for a specific purpose, where trust is reposed in the person who, in the ordinary course of business, sells or lets to hire. The purpose and use, the time for which the article is intended to be used, seem to me the essential part of the contract.

The warranty of seaworthiness in the case of a ship has been traced in many recent cases to its source in the ordinary contract for hiring an article for a specific purpose; and the obligation to provide a roadworthy carriage is not as onerous as the obligation to provide a seaworthy ship, which, in the absence of express terms, is implied in any contract of affreightment: *Steel* v. *State Line Steamship Co.* (1)

Here, the defendant let the carriage for the purpose of carrying the plaintiff safely. The plaintiff trusted him to select the carriage, horses, and driver, and there seems to me nothing unreasonable in charging the defendant with a duty which it was certainly in his power to fulfil, and which from his business he would be presumed to have bound himself to take the proper steps to perform strictly.

Reference has been made to the form of the pleadings, and it has been argued that the question of negligence was the only question raised by the statement of claim, and that his present contention is not open to the plaintiff. I conceive it to be the duty of a judge in cases of this description, to permit such amendments as will permit the real questions in dispute between the litigants to be determined. It is only a question of terms. Here, neither party insisted upon a strict construction of the pleadings. The learned judge would probably not have refused an adjournment, if the defendant had made out that he was not in a position to meet the case made by the plaintiff at the trial. The defendant could hardly have made any such assertion with reason. The defendant knew and the plaintiff did not know how the accident had been brought about. It was from the defendant's witness, who was called to shew that there was no defect in the construc-

(1) 3 App. Cas. 72.

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tion of the carriage, that important evidence was obtained as to the broken bolt. The defendant could not reasonably complain that this evidence was any surprise to him. I will only add that I do not think the defect in question could be regarded as a latent defect—if the obligation of the hirer be restricted to defects which are not latent—a point which it is unnecessary at present to discuss.

Rule absolute.

Solicitor for plaintiff: *A. G. Ditton.*

Solicitors for defendant: *Warry, Robins, & Burges.*

[IN THE COURT OF APPEAL.]

April 26.

(C. A.) Ex. D.

BAINES *v.* BROMLEY AND ANOTHER.

Practice—Costs—Claim and Counter-claim—Costs of the Cause—Judgment—Certificate of Associate.

The plaintiff claimed to recover commission due to him from the defendants on an agreement. The defendants denied the claim, and claimed by way of counter-claim 230*l.* 0*s.* 9*d.* for goods sold. The jury found a verdict for the plaintiff on the claim for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counter-claim for 230*l.* 0*s.* 9*d.* The judgment entered was "that the plaintiff recover against the defendants *l.* for his costs of suit," and "that the defendants recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counter-claim and *l.* for their costs of the counter-claim":—

Held, reversing the decision of Pollock, B., that on taxing the costs according to the judgment the plaintiff and not the defendants was entitled to the costs of the cause.

Semble, per Brett, L.J., that where there is a claim with issues on it and a counter-claim (which is not a set-off but is in the nature of a cross-action) with issues on it, and the plaintiff succeeds on the claim, and the defendant succeeds on such counter-claim, the taxation, if not otherwise ordered, should be by taxing the claim as if it and its issues were an action, and by taxing the counter-claim as if it and its issues were also an action, and the allocatur for costs should be given for the balance in favour of the party in whose favour is such balance; the master on such taxation dividing items which are common to both actions.

APPEAL from a decision of Pollock, B., refusing an application made on behalf of the plaintiff to review the master's taxation. (1)

(1) Ante, p. 197.

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The plaintiff by his statement of claim sought to recover from the defendants commission, which he alleged to be due to him from the defendants upon an agreement made between the plaintiff and the defendants, whereby the defendants agreed that they would execute orders to be given by the plaintiff on behalf of Messrs. Dahl & Co., of Copenhagen for goods in the way of the defendants' business, and that they would supply the goods to the said Messrs. Dahl & Co. through the plaintiff so as to enable the plaintiff to charge Dahl & Co. with the commission. The statement of claim then alleged that the defendants, in breach of the agreement had supplied goods to Dahl & Co. otherwise than through the plaintiff, whereby the plaintiff lost his commission. The defendants in their statement of defence denied the plaintiff's claim, and claimed against the plaintiff by way of set-off and counter-claim 230*l.* 0*s.* 9*d.* for goods sold by them to the plaintiff. The plaintiff by his reply admitted that he was indebted to the defendants in the sum of 230*l.* 0*s.* 9*d.*

The cause was tried before Cleasby, B., and a special jury, in London, in May, 1878, when the jury found a verdict for the plaintiff for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counter-claim for 230*l.* 0*s.* 9*d.* That learned judge directed that judgment should be entered for the plaintiff on the claim, and judgment for the defendants on the counter-claim for 115*l.* 3*s.* 3*d.*, being the balance, and the certificate of the associate was drawn up accordingly. The facts as above stated appear in the said judgment of Pollock, B., but the judgment as entered is not set out nor is it noticed by the learned Baron in his judgment. The judgment as entered was as follows: "Therefore it is adjudged that the plaintiff recover against the defendants *l.* for his costs of suit, which costs were by a master's certificate, dated day of , 1878, allowed at *l.*, and that the defendants recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counter-claim and *l.* for their costs of the counter-claim, which costs were, by a master's certificate, dated the day of , 1878, allowed at *l.*" Upon the taxation of the costs the master treated the case as a verdict for the defendants, and gave to them the costs of the cause, including, among other things, the cost of interrogatories by the plaintiff to the defendants, and allowed the plaintiff only

the costs of his witnesses, whose evidence was essential to establish his claim against the defendants to the extent to which he succeeded.

Pollock, B., upheld this taxation by the master, and dismissed the application to review it.

The plaintiff appealed.

Pollard, for the plaintiff.

[COTTON, L.J. The judgment is that the plaintiff recover his costs of suit and the defendants only the costs of the counter-claim.]

Yes, and by mistake notice of this is omitted by Pollock, B., in his judgment.

[BRETT, L.J. Is not this the ordinary form of judgment?]

It is not denied that that is so; but the costs have not been properly taxed. The "event" in Order LV., rule 1, should be read distributively: *Myers* v. *Defries* (1) and *Ellis* v. *Desilva*. (2) The counter-claim is not pleaded as a set-off but as a cross-action: *Winterfield* v. *Bradnum*. (3) The costs should be taxed in the way ordered in *Cole* v. *Firth* (4), namely, "the costs of and relating to plaintiff's claim, and the proof thereof be paid by the defendants, and the costs of and relating to the defendants' counter-claim and the proof thereof be paid by the plaintiff.".

Forbes, *Q.C.*, for the defendants. The plaintiff really had no judgment for a farthing. He took nothing, because he was indebted to the defendants in a larger amount. Before the Judicature Acts the defendants could have set off what was due to them against the plaintiff's claim and recovered the difference in a cross-action. In that case the plaintiff would be defeated in his action and have to pay the costs of it, and the defendants would succeed in their cross-action and have the costs of them. Why should the result be different by the defendants being allowed now to plead by way of set-off and counter-claim? The distinction between matter of set-off and of counter-claim properly so-called is pointed out by Manisty, J., in *Stooke* v. *Taylor*. (5)

(1) 5 Ex. D. 180.
(2) Ante, p. 521.
(3) 3 Q. B. D. 324.
(4) 4 Ex. D. 301, n.
(5) 5 Q. B. D. 586.

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[BRAMWELL, L.J. Has the master given the plaintiff in this case his costs of suit.]

He has given him the costs of the issues on which he succeeded, and this is what the judgment, when fairly construed, must mean.

BRAMWELL, L.J. I am of opinion that this appeal should be allowed, and I think so by reason of the judgment which, as entered, in terms orders that the plaintiff recover his costs of suit. Both the master and the learned judge would have been right if the old rule, which is still in existence, was applicable, namely, that the party in whose favour was the balance recovered that with the costs of the action. That, however, is not the judgment which was pronounced here; and it is enough for me to say that the taxation which has taken place cannot be supported, having reference to that judgment.

BRETT, L.J. I also think that this appeal must be allowed. The judgment is entered and the costs are by it dealt with as if the defendants had met the plaintiff's claim by a counter-claim in the nature of a cross-action, not of a set-off, and such judgment stands unchallenged. The question is how ought the costs to be taxed when in such a case the plaintiff succeeds on his claim and the defendants on their counter-claim. If this had been treated as a pure set-off to the amount of the plaintiff's claim (as I think it might have been), and it had so appeared on the judgment, then it seems to me that the defendants would have been entitled to the costs of the action, because then the defendants would have denied by way of defence that the plaintiff had any right to bring an action at all. There may be a case where the defence is partly by way of set-off and partly by way of counter-claim, as where the defendant asserts his right to recover the amount of balance due after satisfying the plaintiff's claim by his set-off. It is not necessary to say now how the costs in such a case are to be taxed, because here the judgment is in form, not that the defendants have a set-off, but a counter-claim only. It is as if the defendants chose to deny the whole of the plaintiff's claim and to rest on their cross-action. The costs have been taxed, however, as if the plaintiff had not succeeded at all in his action, but only on certain

issues, and I think that that was wrong. That alone is sufficient to sustain the appeal. I have, however, a firm opinion that where there is a claim with issues taken on it and a counter-claim, not a set-off, but in the nature of a cross-action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counter-claim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions the master would divide them. Where the so-called counter-claim is a set-off, there is but one action.

COTTON, L.J. The sole question here is, I think, whether under this judgment the costs have been rightly taxed. The judgment is that the plaintiff recover his costs of suit, and the question, therefore, is whether the master on taxation allowed the plaintiff such costs. It is clear, I think, that he did not do so, and that the taxation must be reviewed.

Appeal allowed.

Solicitors for plaintiff: *Scott & Barham.*
Solicitors for defendants: *Bell, Brodrick, & Gray.*

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[IN THE COURT OF APPEAL.]

CHAPLEO AND WIFE *v.* THE BRUNSWICK PERMANENT BUILDING SOCIETY AND OTHERS.

Building Society—Unincorporated—Certified Rules—Borrowing in excess of Prescribed Limit — Agent — Authority — Holding out by Society and Directors.

19 Ch D 487
22 Ch D 66
— 197
23 Ch D 449

By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary in accordance with advertisements, issued with the authority of the directors, that such loans might be so made by bringing the money to the office of the secretary. In each case a receipt was given by the secretary for the money as a loan to the society, with a written undertaking by him "to procure the promissory note of the directors for the loan," and afterwards, in pursuance to such undertaking, the receipt was exchanged for such note, which always bore the date of the receipt. After an amount had been so borrowed exceeding the limit prescribed by the rules, the plaintiffs, who had on several previous occasions lent money to the society according to the above mode, paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory note of the directors was ever afterwards given, and the secretary absconded, appropriating that sum, with other moneys of the society, to his own use. In an action against the society and directors, the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—

Held, that such finding was bad in point of law as against the society, and that, as the limit for borrowing prescribed by the rules had been exceeded when the loan was made by the plaintiffs, the society, which had derived no benefit, was not liable for such loan:—

Held (Bramwell, L.J., doubting), that although there was no fraud on the part of the directors they were personally liable to the plaintiffs for the money which had been so advanced.

THIS was an action by Joseph Chapleo and Martha his wife, against the Brunswick Permanent Building Society and six persons who were the directors of such society, to recover the amounts of five several loans which, in 1872, 1874, 1875, 1876, and 1878, had been made by the plaintiff Joseph Chapleo to the society, in some cases in his own name only, and in others in the name of his wife, and which had all been made on the terms, as he alleged, and which was borne out by the evidence, that divers directors of the society should, as a collateral security for the

repayment, deliver their joint and several promissory note for the amount of each such loan. Promissory notes of some of the defendants were accordingly so given for each of the first four loans, and as the amounts of these were paid into court by the defendants and accepted by the plaintiffs, the action became virtually one for only the last of these loans, which was a loan of 100*l.* made by the plaintiff Joseph Chapleo on the 29th of October, 1878.

The society was not incorporated until November, 1878, but its rules were duly certified according to 6 & 7 Wm. 4, c. 32. By the first of these rules its objects as a benefit building society were described, and by the second it was stated that the society should be governed by a board of directors consisting of six shareholders, three of whom should form a quorum; that they should meet once in every fourteen days or oftener, if necessary, to transact business and to determine all matters provided or not provided for by the rules. The tenth rule appointed Messrs. Keighley Lea, Son, & Co. secretaries to the society. The twelfth rule, which related to borrowing by the society, was as follows: "The directors may at any time, as may be necessary for the purposes of the society, borrow money at interest from any banker with whom the funds of the society shall be deposited, or from any other source, to procure which the directors may give such security as they may think proper, but the total amount of money to be so borrowed shall not at any one time exceed two-thirds of the amount for the time being secured by the mortgages to the society." The only other material rule was the thirty-second, which related to the duties of the secretaries. It was as follows: "The secretaries shall superintend and direct the general business. They shall keep the accounts in such manner as shall be satisfactory to the board; they shall call all meetings whether of the board or the society; they shall attend all meetings, take minutes, and furnish any information in their power, and fully attend to every duty pertaining to that office, in consideration of which they shall receive from the funds the sum of 1*l.* per cent. upon all receipts. They shall be at liberty to appoint a person to act for them in their absence."

It was admitted that previously to the 29th of October, 1878,

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when the 100*l.* loan in dispute in this action occurred, the total amount borrowed by the society exceeded the limits prescribed by the twelfth rule. This 100*l.* was brought by the plaintiff Joseph Chapleo to the offices of Keighley Lea & Co., which was the only office of the society, the place where the meeting of the directors took place, and where the four previous loans had been made by the plaintiff in accordance to advertisements issued with the authority of the directors that loans might be made to the society by bringing the money for that purpose to the office of Keighley Lea & Co. Before this last 100*l.* was brought to that office by the plaintiff, the directors had instructed Keighley Lea not to advertise any more, but they had not desired him to withdraw the former advertisements or to give the public notice that they were no longer to be acted upon. On payment of this 100*l.* a receipt was given by a Mr. Fazakerly, a clerk in the office who had received the former loans, for Keighley Lea & Co., which receipt was as follows:—"Received from Mr. Joseph Chapleo, of 411, Oldham Road, Manchester, the sum of 100*l.* as a loan to the Brunswick Permanent Building Society, and we hereby undertake to procure the promissory note of the directors for the said loan.

(Signed) "Keighley Lea & Co.,
"Secretaries,
"100*l.* "by Alfred Fazakerly."

Similar receipts in this form had been given to the plaintiff for the former loans, and promissory notes of the directors according to the undertaking in such receipts had been subsequently given, the notes being dated when the money was entered by Keighley Lea & Co. in the society's cash books, which generally corresponded with the date when the money was lent. No promissory note was ever given for securing this last loan of 100*l.* Keighley Lea, who had for the last three or four years alone constituted the firm of Keighley Lea & Co., absconded in December, 1878, or in January, 1879, having appropriated to himself a large sum belonging to the society. The society and the directors repudiated their liability to the plaintiffs, and consequently this action was brought; and at the trial before Lord Coleridge, C.J., at Manchester, in February, 1880, the following questions were

left to the jury: 1st. Did the society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received? 2nd. Did the defendants the directors? The jury answered both questions in the affirmative, and the Chief Justice, after argument on further consideration, entered judgment for the plaintiffs against both the society and the directors. (1)

From this judgment both the society and the directors appealed.

The society obtained also a rule nisi in the divisional court for a new trial, but such rule nisi was to stand over until after the appeal had been heard.

An application to the divisional court was made on behalf of the directors, for a new trial, on the ground that they were not liable, and had not made themselves personally liable by signing the promissory note. This application was refused by the Court, and the following judgments were delivered.

GROVE, J. I am of opinion that there should be no rule in this case. It differs very much in my opinion from the point raised by the Solicitor General who appeared for the society, because this is a case in which certain individuals who were directors of the society are sued, and it is shewn by the evidence, that those directors had for a very considerable period of time signed promissory notes, and acted upon what Keighley Lea had done as their agent. He had unquestionably acted with their consent as their agent in receiving money as loans for the society, and they sanctioned what he so did by making themselves personally liable as signers of promissory notes. That is very strong evidence that they authorised him to so act as their agent and that they held him out to the public as their agent. These very plaintiffs and others had paid money and received these promissory notes which the directors had themselves signed, shewing that they adopted the receipt of the money and became responsible for it. Lea acted as their agent, and they held him out as their agent for a considerable time when they had no right as directors to borrow money at all, but were admittedly going beyond the

(1) 5 C. P. D. 331.

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power conferred upon them as to the amount of money they were authorised to borrow. It appears to me that that is strong and ample evidence of these defendants, the directors, holding out Lea as a person authorised by them to borrow money for the society, they having frequently sanctioned his acts to borrow money for the society, and therefore there was ample evidence of their being personally liable. I think, therefore, that not only was the direction of my Lord right, but that the verdict of the jury was perfectly right upon the question he left to them.

The argument of Mr. Crompton is this, that the directors were not liable because Lea gave a particular form of receipt to the plaintiff Chapleo in this case, in which, after acknowledging the receipt of the loan for the society, he added an undertaking of his own that he would get the directors to sign the promissory note. I do not think that that form of receipt alters the case, the real question is did the directors, at a time when they had no power to borrow money for the society, choose themselves upon their own responsibility to borrow money which as directors of the society they had no right to do. Did they authorise Lea as their agent to receive loans, nominally for the society, but for which they took upon themselves the responsibility. I think there is ample evidence of this, and therefore, to my mind, the form of the receipt becomes immaterial. Even assuming for the moment that the form of receipt would have justified Mr. Crompton's argument, had this been a single transaction, I do not think that it can get over a long course of business in which they authorised Lea to receive money from persons on loan which they had no right as directors of the society to do, and which they therefore did upon their own responsibility. I think, on these grounds, that there should be no rule.

LINDLEY, J. I am of the same opinion. This was an action brought by Mr. Chapleo to recover a sum of 100*l.* advanced by him, ostensibly, and as far as he knew, to the Brunswick Permanent Benefit Building Society. In point of fact, it appears that he handed that money to a clerk of Keighley Lea & Co. What we have to consider is, what was the position of Keighley Lea & Co., what power was there to borrow money at all, and

what part the directors took in conducting that part of the business of the society which related to the borrowing of money. Now, the rules of the society were these. The first rule states what the objects of the society are, and rule 2 says that the society shall be governed by a board of directors. [The learned judge then read rules 10, 12, and 32.] Now the power to borrow is therefore vested in the directors. They have power to borrow, but at the same time, there is a limit set to the exercise of that power, and it is their business to see that this limit is not exceeded. It seems that the facts are these, that that power was exhausted, that is to say, more than two thirds of the amount for the time being secured by the mortgages to the society had been borrowed, and therefore if the directors allowed Keighley Lea & Co. to borrow money for the society after that limit was passed, the directors would in effect be holding out Keighley Lea & Co., as authorised to borrow money for the society when there was no power to borrow at all; and that is what the directors did; and upon that ground the action against the directors appears to me to lie upon the plainest possible principles, the principle being that they represented to the plaintiffs that they, the directors, were empowered, and that Keighley Lea & Co., who managed the details of the business, were authorized to borrow money for the society when there was no power to borrow money, and it seems to me that the directors are bound to pay on every ground, and that of course includes the ground upon which more particularly the case was left to the jury.

It appears that the way in which the money was lent was this: the cash was paid to Keighley Lea & Co., or to some clerk of theirs, and at the same time a receipt was given which acknowledged that the sum had been received for the society, and then there was an undertaking by Keighley Lea & Co., to procure the promissory note of the directors for the loan. That was the course of practice, and it had been followed in a great variety of cases for a great number of years, and in particular with reference to this very plaintiff, Chapleo, because he had advanced money on such receipts before he advanced this particular hundred pounds in question, and conformably with that usual practice the directors had given to the lenders generally,

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and to this lender in particular, promissory notes signed by five of them, which was the security referred to in rule 12. Now the matter was put to the jury in this way. [The learned judge here read the direction of Lord Coleridge, C.J., and the questions he left to the jury.] The jury say yes to both questions. We are not now discussing the liability of the society, that is open to consideration, and will have to be argued hereafter, but as against the directors it is perfectly plain to me not only that there is evidence that they did authorize Lea to borrow money for the society upon the old terms, but there is abundant evidence that there was authority given to Lea to borrow money for the society generally without reference to those particular terms. In either way the directors were holding out Lea as entitled to borrow money for the society when there was no authority whatever from the society to do anything of the kind. It appears to me, therefore, on these grounds that there was no misdirection, and that the verdict was right and that there ought to be no rule.

LORD COLERIDGE, C.J. I am of the same opinion.

The directors appealed, and obtained from the Court of Appeal a rule nisi for a new trial, which was directed to come on with the appeal from the judgment of Lord Coleridge, C.J.

Sir John Holker, Q.C., and *Crompton*, for the defendant directors. The decision in *Drew* v. *Nunn* (1), carries the doctrine of holding out to the extreme limit, and the judgment now appealed from goes further. The judgment is incorrect as to Keighley Lea's authority; he could not have authority to act dishonestly. The cases cited by the Lord Chief Justice, of *Barwick* v. *English Joint Stock Bank* (2); *Mackay* v. *Commercial Bank of New Brunswick* (3); and *Western Bank of Scotland* v. *Addie* (4); do not support his judgment.

[BRAMWELL, L.J. In *Pharmaceutical Society* v. *London and Provincial Supply Association* (5), Lord Blackburn is reported

(1) 4 Q. B. D. 661.
(2) Law Rep. 2 Ex. 259.
(3) Law Rep. 5 P. C. 394.
(4) Law Rep. 1 H. L., Sc. 145.
(5) 5 App. Cas. at pp. 869, 870.

to have said "A corporation may be fined, and a corporation may pay damages; and therefore I must totally dissent, notwithstanding what Lord Justice Bramwell said, or is reported to have said, upon the supposition that a body corporate or a corporation that incorporated itself for the purpose of publishing a newspaper could not be tried and fined, or an action for damages brought against it for a libel; or that a corporation which commits a nuisance could not be convicted of the nuisance, or the like." I think there must be some mistake in the report, for it makes Lord Blackburn confound action and indictment, and surely mens rea is necessary to constitute crime.]

The whole law on the subject now before the Court is to be found in *Beattie* v. *Lord Ebury* (1), and in *Eaglesfield* v. *Marquis of Londonderry*. (2) If the society is liable there is no false holding out on the part of the directors, and if the society is not liable, the misrepresentation (if any) is not fraudulent. If any previous authority was given to Lea it was revoked, but that question was not left to the jury. The directors are entitled to judgment, or, if not, there ought to be a new trial.

Sir F. Herschell, S.G., and *G. W. Heywood*, for the defendant society. There could be no power to borrow apart from the rules of the society: *In re National Permanent Benefit Building Society, Ex parte Williamson* (3); *Laing* v. *Reed* (4); *In re Victoria Permanent Benefit, Building, Investment, and Freehold Land Society, Hill's Case, Jones's Case.* (5) The only power to borrow here was under rule 12. It is clear that a rule authorizing unlimited borrowing would be illegal, yet, if holding out has the effect here contended for, any rule limiting the borrowing powers is useless. The decisions are strongly against the liability of the society: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (6); *Richardson* v. *Williamson* (7); *Weeks* v. *Propert* (8); *Fountaine* v. *Carmarthen Ry. Co.* (9); *In re Kent Building Society* (10); *In re Vale of Neath and South Wales Brewery Joint Stock Co.*,

(1) Law Rep. 7 Ch. 777; ibid. 7 E. & I. 102.
(2) 4 Ch. D. 693.
(3) Law Rep. 5 Ch. 309.
(4) Law Rep. 5 Ch. 4.
(5) Law Rep. 9 Eq. 605.
(6) Law Rep. 7 E. & I. 653.
(7) Law Rep. 6 Q. B. 276.
(8) Law Rep. 8 C. P. 427.
(9) Law Rep. 5 Eq. 316.
(10) 1 Dr. & Sm. 417.

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Ex parte Morgan (1); *In re Professional, Commercial, and Industrial Benefit Building Society.* (2) It is contended here that the plaintiffs are not bound by the rules, because they did not personally know of them; this is incorrect, in *Balfour* v. *Ernest* (3) Willes, J., said: "Every person dealing with the company, is bound to know the contents of the company's deed of settlement: *Royal British Bank* v. *Turquand.* (4)"

Charles Russell, Q.C., and *S. Taylor* (*C. A. Russell*, with him), for the plaintiffs. The defendant society is liable. The society was not incorporated when the cause of action arose, and it was only a partnership with certain statutory rules and restrictions. The 10 Geo. 4, c. 56, was only a Friendly Societies Act, and benefit building societies were first established by 6 & 7 Wm. 4, c. 32, which applied the provisions of the Friendly Societies Acts to benefit building societies, and enabled them to make rules, and *Laing* v. *Reed* (5) shews that they may make a rule for borrowing a limited amount of money for the purposes of the society. Being not incorporated the individual members might be liable like any other individuals for what has been done under an implied authority given to their agent to borrow. That the borrowing power was exceeded is a matter which could only be known to the officers of the society, and not to the persons who lent their money, and the society must be liable for the fraud or wrongful act of their agent who was held out as having authority to borrow for the society: *Mackay* v. *Commercial Bank of New Brunswick* (6); *Houldsworth* v. *City of Glasgow Bank* (7); *Swift* v. *Winterbotham* (8); *Barwick* v. *English Joint Stock Bank.* (9) That last case is supported, though its reasoning is not considered to be satisfactory, by Bramwell, L.J., in *Weir* v. *Bell.* (10) It has also been approved of in *Swire* v. *Francis.* (11) As regards the defendant directors, the authorities cited on behalf of the society establish the liability of the directors. It is clear from the evidence that Lea was authorized by them to take money on

(1) 18 L. J. (Ch.) 265.
(2) Law Rep. 6 Ch. 856.
(3) 5 C. B. (N.S.) 601, at p. 623.
(4) 5 E. & B. 248; 6 E. & B. 327.
(5) Law Rep. 5 Ch. 4.
(6) Law Rep. 5 P. C. 394.
(7) 5 App. Cas. 317.
(8) Law Rep. 8 Q. B. 244.
(9) Law Rep. 2 Ex. 259.
(10) 3 Ex. D. 238, at p. 244.
(11) 3 App. Cas. 106.

(3) 5 C B N S 436
(4) 5 E & B 248. 1856. 6 E & B 45. 663

loan to the society with an undertaking that it should be secured by promissory notes signed by such directors, and this liability on the part of the directors can exist together with the liability of the society. Next, if the society be not liable, because its borrowing power had already been exceeded, then the directors would be still liable on the ground that they had authorized Lea to warrant to lenders that the society had authority to borrow: *Weeks* v. *Propert* (1) and *Richardson* v. *Williamson*. (2) The course of practice shewed also that the directors authorized Lea to undertake for them that they should sign promissory notes by way of security for the loans to the society.

Sir F. Herschell, S.G., was not called on to reply for the society.

Crompton, replied for the directors, and cited *Baines* v. *Ewing*. (3)

Cur. adv. vult.

March 7. BRAMWELL, L.J. I am of opinion that the judgment against the society should be reversed, and that judgment should be given for the society. I might content myself with saying that I am of that opinion, for the reasons so admirably given by the Solicitor General, which I cannot improve. The society, before it was incorporated, was not a society with an implied power in some of the partners to borrow money and bind the others for what should be borrowed, but by their rules they were authorized to borrow to a limited amount, and consequently to the extent of that amount, the agents of the society, that is to say, the directors had power to borrow and bind the society. In point of fact, they had exceeded that limit when this money was taken from the plaintiffs. The directors, therefore, if they borrowed that money, borrowed it without any authority binding on the society, and consequently, in my judgment, the society is not bound. Then it was said that there was a holding out; but before I come to that I wish to observe upon the point that has been made that a person dealing with the agents of a society, which has given a limited authority, is not bound to inquire whether that authority has been exceeded or not. I am clearly of a different opinion. When

(1) Law Rep. 8 C. P. 427. (2) Law Rep. 6 Q. B. 276.
(3) Law Rep. 1 Ex. 320.

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people deal with those who they know have a limited authority, they must either ascertain its extent or they must deal with them at their peril, and if the authority is exceeded, the principals are not bound. It is not necessary to refer to the decisions cited by the Solicitor General; they clearly establish what I have said. Then it was said there was a holding out by the society, the holding out being that the directors had power to borrow to a certain extent, but as that is all the society held out it was nothing but the truth. Whereas the holding out doctrine is truly applicable where the holding out is something other than the truth. All that the society held the directors out as having power to do, was what they had power to do; so that there was no holding out in the sense which would make the society liable for having represented something to be the truth which was not the truth.

Then we come to the question as to whether the defendant directors are liable, and upon that I cannot but say that I entertain the very gravest doubt. There is no fraud imputed to them. There is the customary carelessness and indifference of people who make rules, and then put them on one side, and go on as if there were no rules made at all, but that is all. It is said that they agreed that they would give their promissory note. This agreement is said to be found in the document or receipt given by Keighley Lea for the money of the plaintiffs. I am most strongly of a different opinion. In my opinion that document is either an agreement by Keighley Lea personally, or, as I should prefer to think, it is an agreement by him as agent of the society. It is true he had no authority to give such an agreement for the society as agent, but he did, and it is not because he had no authority to bind the society, that, therefore, it is to be taken that he bound somebody else. I own I am of opinion that there was no agreement on the part of the defendant directors to give the promissory note. But then it was suggested upon the authority of *Collen* v. *Wright* (1) and *Richardson* v. *Williamson* (2) that the defendant directors had purported to act under the authority of the society, and undertook to the plaintiffs that they had the authority of the society. I have very

(1) 7 E. & B. 301; S.C. 26 L. J. (Q.B.) 215. (2) Law Rep. 6 Q. B. 276.

3 Jur. N.S. 363

great difficulty in assenting to that. All that they did, or must be taken to have done, was this, that they told Keighley Lea that he might say that he had the authority of the society to do what he did, but I have very great difficulty in seeing that that is within the principle of *Collen* v. *Wright* (1) and *Richardson* v. *Williamson*. (2) It seems to me manifest that if Keighley Lea were sued he would be liable, upon the principle on which it is sought to make the defendant directors liable, that is to say, that he assumed to have an authority from the society to receive this money when, in point of fact, he had none. It is true that he might have a remedy over against the defendant directors on the ground that he had made the representation, because he had been told by them to do so; but that argument goes rather to shew that the remedy of the plaintiffs was against Keighley Lea, and not against the defendant directors who did not make any representation to the plaintiffs themselves, but who told Keighley Lea that he might make such a representation. That is the difficulty I have felt in this case, and it is a difficulty that has not been removed, but my colleagues entertain a strong opinion that the plaintiffs are entitled to recover, and a strong opinion to the same effect has been expressed by the Court below, especially by my Brother Lindley, and under the circumstances I do not think myself justified in dissenting therefrom, and consequently the judgment against the defendant directors will be affirmed.

BAGGALLAY, L.J. The action in which these appeals have been brought was originally commenced for the recovery of five several sums of money, which it was alleged by the plaintiffs had been lent by them to the Brunswick Benefit Building Society, the defendants to the action being the society and its six directors.

The loans of four of the five sums were admitted by the society, and the amounts having been paid into court were accepted by the plaintiffs; the action became thenceforth an action for the recovery of 100*l.* alleged to have been lent by the plaintiffs to the society on the 29th of October, 1878, and which is the latest in date of the five loans before mentioned; it is consequently immaterial to consider the circumstances of the four earlier loans,

(1) 7 E. & B. 301; S.C. 26 L. J. (Q.B.) 215. (2) Law Rep. 6 Q. B. 276.

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except so far as they illustrate the mode in which the loan transactions of the society were carried out.

The society was established in the year 1871, its rules being duly certified in accordance with the provisions of the statute 6 & 7 Wm. 4, c. 32. The 1st rule defined the objects of the society, which were the usual objects of a benefit building society; the 2nd provided for the government of the society by a board of directors, consisting of six shareholders, who were to meet once in every fortnight, or oftener if necessary, to transact business, and who were to determine all matters provided or not provided for by the rules; and, by the 12th, the directors were empowered to borrow money for the purposes of the society, and to give such security for the same as they might think proper, but the total amount to be so borrowed was not at any time to exceed two-thirds of the amount for the time being secured by the mortgages of the society.

Under this power the directors borrowed large sums of money, and the mode in which the several loan transactions were carried out was as follows: any person desirous of lending money to the society paid it to the firm of Keighley Lea & Co., at their offices in Manchester, taking in return their receipt for the amount so paid, in a form to which I shall have occasion presently to more particularly refer, and such receipt was subsequently exchanged for a promissory note in favour of the lender, signed by the directors for the time being of the society. It should be stated that by the 10th rule of the society Messrs. Keighley Lea & Son were appointed the secretaries to the society, their duties being defined by several other rules: the 32nd has been relied on by the plaintiffs, and I may conveniently mention it now; it is in these terms: [The Lord Justice here read the 32nd rule.]

This authority in terms confers upon the secretaries a considerable amount of authority in respect of the management of the society's affairs, but it must be borne in mind that the duties and powers of the directors are at least as clearly defined by the rules, and that the exercise of the power of borrowing is clearly vested in the directors. It appears from the evidence that the meetings of the directors were held, and that all the business of the company was transacted at the offices of Messrs. Keighley Lea & Co.,

who acted in the like capacity for several other benefit building societies.

On the 29th of October, 1878, the plaintiff, Joseph Chapleo, took the sum of 100*l.* to the offices of Keighley Lea & Co., and on payment of it to a Mr. Fazakerly, a clerk of the firm, a receipt was handed to him in the following terms:—

"Received from Mr. Joseph Chapleo, of 411, Oldham Road, Manchester, the sum of 100*l.* as a loan to the Brunswick Permanent Building Society, and we hereby undertake to procure the promissory note of the directors for the said loan—100*l.* Keighley Lea & Co., Secretaries, by Alfred Fazakerly."

The circumstances under which the 100*l.* was taken to the offices of Keighley Lea & Co., and the receipt given for it, were in all respects similar to those under which the four previous loans had been made by the plaintiffs.

Upon the occasion of each of the previous loans the receipt was given by Fazakerly, and the promissory note of the directors for the time being was subsequently given in exchange for the receipt; several weeks, and upon one occasion as much as three months, elapsed before the notes were given; but when given they bore the dates of the respective receipts.

Some two months after the receipt for the 100*l.* had been given, Keighley Lea, who since the year 1874 had alone constituted the firm of Keighley Lea & Co., absconded without having procured from the directors a promissory note in favour of the plaintiffs, in accordance with the undertaking contained in the receipt, nor was any such promissory note in fact ever given to the plaintiffs. The action was therefore commenced, as already mentioned, to recover the amount of all the five loans, the promissory notes given for the four earlier still remaining unpaid.

With the view of keeping the nature of the loan transaction free from complication, I have hitherto abstained from directing attention to the fact that for some time previously to October, 1878, the total amount of money borrowed on account of the society considerably exceeded that which the directors were empowered to borrow, but this fact is the basis of the defence of the society to the plaintiffs' claims.

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Upon the trial, Lord Coleridge submitted the two following questions to the jury :—

1. Did the defendant society hold out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms on which it was received?

2. Did the defendants, the directors?

Both of these questions the jury answered in the affirmative; this was on the 20th of March, 1880, and on the 24th of April that learned judge directed that judgment should be entered for the plaintiffs against all the defendants. From this judgment both the society and the directors have appealed to this Court, on the ground that upon the findings of the jury the judgment so directed to be entered against them was wrong.

Shortly after the trial, this Court, upon the application of the defendants, the directors, and by way of appeal from the Common Pleas Division, granted a rule nisi for a new trial, and directed that cause should be shewn at the same time that the appeals were heard. We have consequently now to dispose of both appeals and the directors' application for a new trial. It may be mentioned that a rule nisi for a new trial has been obtained by the society in the Common Pleas Division, but the argument upon the rule has been postponed until after these appeals have been disposed of. I will consider first the appeal of the society.

The judgment of Lord Coleridge from which the society have appealed was apparently based upon the following considerations, that the society not being a corporation, might as a body, just as any other co-partnership might as a body, know, and so act upon their knowledge, as to sanction the proceedings of Keighley Lea; that of this knowledge and of their so acting upon it abundant evidence had been given against the society; and that the society, having put their agent in their place to do the very acts for them which he did, must be answerable for the manner in which he conducted himself in doing those Acts. It had been pressed upon Lord Coleridge, as it has been upon us, that the society had no authority to borrow beyond the limit ascertained by the 12th rule, and that it could not ratify the Acts of its directors in so borrowing, but he was of opinion that that argument was not well founded. Differing, as I feel bound to do, from the views so taken by Lord

Coleridge of the liability of the society in respect of the borrowings beyond the prescribed limits, I proceed to state the grounds upon which I have arrived at a conclusion different from that arrived at by him.

Benefit building societies, established under the Act of 6 & 7 Wm. 4, c. 32, have no power to borrow unless it has been conferred upon them by their certified rules. The authorities upon this point are numerous and free from doubt. If it be necessary to mention one I will refer to the case of the *Professional Benefit Building Society* (1), in which James, L.J., stated the well recognised proposition in the following terms: "A society of this kind is not entitled to borrow money except under a particular rule; it is no part of its business to borrow money." And if a limited power is conferred upon a society by its rules, the limits so prescribed ought not to be exceeded, and any borrowing in excess of the limits is a wrongful act. In the case which we are now considering the power of borrowing had been exhausted previously to the month of October, 1878, when the 100*l.* was received from the plaintiffs, and the society had not at that time any power or right to borrow that or any other sum, and whether the 100*l.* was borrowed by Keighley Lea upon his own responsibility or pursuant to instructions given to him by the directors or by their implied authority, it was in my opinion equally a wrongful act. The acts of the directors would in no way give effect to that which was in itself unlawful, nor in my opinion would the assent of every shareholder to the transaction make it binding upon the society as a society, whatever might have been the liability of individual shareholders. The observations of the Lord Chancellor upon this subject in *Ashbury Railway Carriage Company* v. *Riche* (2) appear to me to support this view; though Lord Coleridge was apparently of a different opinion. If the society had received the benefit of the 100*l.*, if, for instance, that amount had found its way to the credit of their banking account, the plaintiffs might, upon the authority of some of the decisions which have been cited in their behalf, have been enabled to establish a claim against the society to the extent of the benefit derived by them from the transaction, but no such benefit was derived by the

(1) Law Rep. 6 Ch. 861. (2) Law Rep. 7 E. & I. 672.

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society from the transaction with which we are dealing. Our attention was particularly directed during the argument by the counsel for the plaintiffs to the observations of Lord Hatherley in the case of *Houldsworth* v. *City of Glasgow Bank* (1), to the effect that a corporation is bound as much as an individual by the wrongful acts of its agent, and that the result of misrepresentations by an agent must take effect in the same manner against a corporation as it would against an individual; to the general principles involved in these observations of Lord Hatherley, especially as applied to the case then under consideration, I give, as I am bound, a ready assent, but it is clear, when the case is examined, that Lord Hatherley is referring to an agent *acting within the scope of his authority*, and I cannot assent to the proposition that either the directors, as such, or Keighley Lea, as secretary, were acting within the scope of their authority when they purported to borrow money on account of the company, at a time when the society had not to their knowledge any power or authority whatever to accept a loan. The cases of *Barwick* v. *English Joint Stock Bank* (2), and *Mackay* v. *Commercial Bank of New Brunswick Company* (3), which have been relied upon by the plaintiffs were also cases in which the agent was acting within the scope of his authority. Had it been the case, the other facts remaining the same, that the society had not exhausted its borrowing powers at the time when the 100*l.* was received from the plaintiffs, it might probably have been held that the directors and Keighley Lea were acting within the scope of their authority in receiving the money, and that the society were liable for the subsequent misconduct of its secretary. It has also been urged upon us that the plaintiffs had no means of knowing or ascertaining whether the society had exhausted its powers of borrowing or whether indeed there was any limit to such power. To this argument I can only reply that persons who deal with corporations and societies that owe their constitution to or have their powers defined or limited by Acts of Parliament, or are regulated by deeds of settlement or rules, deriving their effect more or less from Acts of Parliament, are bound to know or to ascertain for themselves the nature of the

(1) Law Rep. 5 App. Cas. 317. (2) Law Rep. 2 Ex. 259.
(3) Law Rep. 5 P. C. 394.

constitution, and the extent of the powers of the corporation or society with which they deal. The plaintiffs and every one else who have dealings with a building society are bound to know that such a society has no power of borrowing, except such as is conferred upon it by its rules, and if in dealing with such a society they neglect or fail to ascertain whether it has the power of borrowing, or whether any limited power it may have has been exceeded, they must take the consequences of their carelessness. It may be that the plaintiffs in the present case have been misled, by the misrepresentations or conduct of others, into the belief that the company had full authority to accept the loan from them; that is a question which I shall have to consider when dealing with the other appeal; such representations or conduct may doubtless give rise to a claim against the parties making such misrepresentations or so conducting themselves, but in my opinion they can in no way give rise to or support a claim against the society.

Holding these views upon the facts of the case, I am of opinion that the appeal of the society should be allowed. But it is said that the judgment of Lord Coleridge ought not to be reversed, having regard to the finding of the jury that the society held out Keighley Lea to the plaintiffs as having authority to receive this loan on their behalf on the terms upon which it was received. I am of opinion that the jury ought not to have so found in point of law, whatever conclusions they might arrive at from the facts. The society could only hold out to the plaintiffs that Keighley Lea had such authority in one or other of two ways; it might have been so represented by the rules of the society, but the rules, taken in connection with the admitted fact that the powers of borrowing were exhausted, negative any such authority; the only other way in which such a representation could be made so as to bind the society would be by the directors acting within the scope of their authority, and this was apparently the view adopted by Lord Coleridge, but, in my opinion, it was not, as I have already pointed out, within the scope of the authority of the directors to make such a representation as the one found by the jury to have been made. Whether the society held out Keighley Lea to the plaintiffs as having authority to

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accept the loan of 100*l.*, was, in my opinion, a question of law for the judge to decide, notwithstanding the finding of the jury.

Then, as regards the appeal of the directors, the judgment of Lord Coleridge appears to have proceeded upon the view that there was ample evidence that the directors held out Keighley Lea to the plaintiffs as authorized to undertake for them that they would give their promissory note on the receipt of moneys paid as the 100*l.* was paid, and that they are consequently bound by his undertaking, and must either give their promissory note, or, in the events which have happened, pay the money.

I do not dissent from this view of the case, but I prefer rather to rest my own decision upon the grounds assigned by Lindley, J., when the rule nisi for a new trial was refused in the Common Pleas Division. The evidence, into which I need not enter in detail, satisfies me, that after the directors well knew that the power of borrowing had been exhausted, and that any further borrowing would be contrary to the constitution and rules of the society, and therefore wrongful, they authorized Keighley Lea to continue receiving money by way of loan on account of the company, and to do so in the same way as he had previously received money before the borrowing powers were exhausted; that the plaintiffs, who had lent money to the company before its borrowing powers were exhausted, finding a continuation of the same mode of receiving money as to loan, were naturally led into the belief that Keighley Lea still had authority to receive their money, and that they advanced this 100*l.* accordingly. I am of opinion, therefore, that the appeal of the directors should be dismissed.

As regards the rule nisi for a new trial obtained in this court by the directors, I am of opinion that it should be discharged. We have the whole of the materials before us necessary for finally determining the questions in dispute. Moreover, I am of opinion that even if, as has been contended, there was any misdirection at the trial, as to which I desire to be considered as not expressing an opinion, no substantial wrong or miscarriage has been thereby occasioned to the defendants, the directors; and the 3rd rule of the Order XXIX. and the 10th rule of Order XL. are, in my opinion, clearly applicable.

BRETT, L.J. I am of opinion that the judgment ought to be in favour of the society, notwithstanding the findings of the jury. If the finding in answer to the first question could be construed to mean that the society had authorized Keighley Lea to hold out anything to the plaintiffs with respect to this loan, I am of opinion that there was no evidence of such holding out. Moreover, if it were true that every individual member of the society had agreed to authorize Keighley Lea to hold out that he was so authorized, it seems to me that notwithstanding this the society as a society could not be sued. But, in truth, it seems to me that this first question was left by way of caution, and that its real meaning as intended by the learned judge, and as understood by the jury, was whether the society had held out anything to the plaintiffs by and through the directors. In either case it seems to me that the finding cannot be supported. Now supposing that the meaning is that this was done by the directors, in my opinion when the money was paid to Keighley Lea, the loan was accepted for the society; and the question is whether the directors had authority to accept that loan or to authorize Keighley Lea to accept it, and it seems to me that they had not. If the society had an unlimited power to borrow, but had nevertheless given secret orders to its agent not to borrow beyond a certain amount, I should have thought nevertheless the society was bound, because the plaintiffs would not have been called upon to inquire as to any secret authority: but where a society or a company has upon the face of its constitution, that is either by the statute or statutory rules under which it is constituted, only a limited authority to borrow, then it seems to me that a person dealing with such a society or company must either inquire or run the risk. Here this society by reason of the Friendly Societies Act, and also by reason of its own rules gave to its directors only a limited power to borrow. That limit was exceeded. The plaintiffs did not inquire; and though probably if they had inquired they would have learned nothing; yet that is their misfortune, and they are debarred from recovering against this society. Then it is said that the society had held out Keighley Lea as a person to accept this loan. That it did so by the directors it cannot be doubted, but the directors had no authority from the society or its rules to authorize anybody to hold out

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anything on behalf of the society. On no ground that I can see can this finding be maintained as against the society; as a matter of law it could never bind the society, and therefore our judgment ought to be for the society on this appeal.

Of course the question remains as to the case against the directors. Now I am clearly of opinion that there is no evidence in this case of any fraud, and that we must determine this matter upon the supposition that there is no fraud upon the part of the directors; nevertheless in my opinion they are bound; and I think so for two reasons. In the first place the directors authorized the issue of advertisements, which seem to me to have been an invitation to anybody who chose to do so, to come to Keighley Lea's office and to hand to him money upon the terms that it was to be a loan to the society, and further that the directors (who were not obliged to do so, though they chose to offer to do it) would give their promissory note for the society. They promised to do this as principals, but of course when they gave their promissory note they would be sureties. Now that being the state of things upon the advertisements which the directors authorized to be issued, when people brought their money to Keighley Lea, the evidence to my mind shews that the money was at once then accepted as a loan to the society. Keighley Lea reported to the directors what he had done, but they did not consider whether they would or would not accept the loan, but only acknowledged the fact of the loan reported to them, and the loan seems to me to have been always effected the moment the money was handed to Keighley Lea. It seems to me there was evidence also that the directors must have known, as the jury no doubt considered that they did, the form of the receipt which Keighley Lea had invariably for years given. It is said that the directors instructed Keighley Lea not to advertise any more, but they did not instruct him to withdraw the advertisements already given, or to give notice to the public that these previous advertisements were not to be acted upon. To my mind they never directed Keighley Lea not to receive the money. All they directed him to do was not to press the public with further advertisements. Therefore it seems to me that the plaintiff Chapleo, who had not only seen former advertisements but who had acted upon them, was justified in bringing his money

upon the old terms. Now as to the construction of the receipt, the form of which, I think, was known to the directors. The only terms upon which the money was received, was that the money should be a loan to the society; and the directors, unless they entered into contract to do so, were not bound to affix their names to any promissory notes. Nevertheless it is clear from the course of dealing that any person who gave money as a loan was not merely to have the obligation of the society, but to have the personal obligation of the directors. It seems to me that the true construction to be put upon this document which is called a receipt, but which is evidently something more, is that it is a declaration by the directors, made with their authority, to the person lending his money, that his money was then and there received as a loan to the society; and secondly, that the directors authorize Keighley Lea to promise for them that such lender shall have their promissory note signed by the directors. Upon that ground it seems to me that the directors would be personally liable. But supposing they were not, then it must come to this—it certainly is a representation to the plaintiff Chapleo that his money is lent on loan to the society, and such representation is made by the authority of the directors. Is not that a representation by them that they have authority from the society to borrow for the society? It seems to me that that is the true construction upon that point, and if it be so, it would be absolutely within the case of *Collen* v. *Wright* (1) and other cases.

It must be taken that when the directors represented that they had authority which they had not, by reason of the limit to borrowing having been passed, they nevertheless warranted to the plaintiff Chapleo that they had that authority. Therefore upon that ground they are liable. But if it be taken that it is a promise by them on behalf of the society that the society would procure their signatures, then it would seem to me that there again they are representing that they were agents for the society with an authority which they did not possess. Then they must be taken to warrant that, and therefore in either view it is within the case of *Collen* v. *Wright* (1), and according to the doctrine of that case these directors are personally liable.

(1) 7 E. & B. 301; 26 L. J. (Q.B.) 215.

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BRAMWELL, L.J. I meant to say that the receipt or document signed by Keighley Lea, if it be an agreement, is to my mind either an agreement personally by him, or is an agreement on behalf of the society and not an agreement on behalf of the directors.

Appeal of the society allowed, and judgment against the society reversed.

Appeal of the directors disallowed, and rule nisi obtained by them for a new trial discharged.

Solicitors for plaintiffs: *Cobbett & Co.*
Solicitors for defendant society: *Heywood & Son.*
Solicitors for defendant directors: *Sale & Co.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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In the Second Series,
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ASSIGNMENT OF DEBT—*continued.*
of 1380*l.* due on the mortgage deed, and all interest thenceforth to become due, and all securities for principal and interest and all benefit and advantage thereof, and all his right, title, interest, and property therein to secure repayment to the bankers of 939*l.* then due to them on his banking account, and any further sum not exceeding 1200*l.* which might thereafter become due to them from him, with a proviso for reconveyance of the premises if the assignor should on a day named pay them back the 939*l.* and any further sum not exceeding 1200*l.* which might be due, with interest. The bank having given notice in writing of this assignment to the mortgagor sued him for 984*l.* then due on the assignor's banking account:—*Held*, by Pollock, B., that the assignment to the bank by the deed of 1879 was not an "absolute assignment (not purporting to be by way of charge only)" within the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, sub-s. 6, and that the action could not be maintained. NATIONAL PROVINCIAL BANK OF ENGLAND *v.* HARLE - - - **Ex. D. 626**

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BANKRUPTCY—*continued.*
Bankruptcy Act, 1869, and his trustee, under an order of the Court of Bankruptcy, disclaimed the lessee's interest in the premises. Notice of the application to the Court for leave to disclaim was given to the sub-lessee within a reasonable time before the order was made. The lessor having brought an action to recover possession of the part of the premises demised to the sub-lessee as from the date of the appointment of the trustee :—*Held*, by Mathew, J., that the lessor was entitled to recover possession.—*Taylor* v. *Gillott* (Law Rep. 20 Eq. 682) followed. Smalley *v.* Hardinge
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2. —— *Notice of Act of Bankruptcy—Notice of Petition—Execution Creditor—32 & 33 Vict. c. 71, s. 95, sub-s. 3.*] A notice to an execution creditor which states that a petition in bankruptcy against the execution debtor has been filed on a date, at a court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction within 32 & 33 Vict. c. 71, s. 95, sub-s. 3, since such creditor ought to know that the petition would contain a statement that the debtor has committed an act of bankruptcy :—So *held*, affirming the decision of the Common Pleas Division.—*Hocking* v. *Acraman* (12 M. & W. 170) commented on. Lucas *v.* Dicker - - C. P. D. 84

BASTARDY—*Order of Maintenance—Marriage of Mother after making of Order—Liability of Putative Father.*] An order obtained by a single woman for the maintenance of a bastard child can be enforced against the putative father after the marriage of the mother. Sotheron *v.* Scott
[Q. B. D. 518

BIGAMY—Presumption of duration of life 366
See Criminal Law—Bigamy.

BILL OF LADING—Title of first indorsee 475
See Sale of Goods.

BILL OF SALE—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Statement of Consideration.*] A. being indebted to B., gave him a bill of sale to secure the sum of 7350*l.*, which, on stating the accounts between them, was found to be the balance due, and by such bill of sale this sum was to be paid by A. with interest on demand in writing. The bill of sale recited that B. had agreed to lend A. 7350*l.*, and the consideration for such bill of sale was stated therein to be 7350*l.* then paid by B. to A. :—*Held*, that the bill of sale truly set forth the consideration for which it was given so as to satisfy s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), although no money in fact passed from B. to A. at the time the bill of sale was given The Credit Company *v.* Pott
[Ex. D. 295

2. —— *Proviso for Possession by Mortgagor—Sale by Mortgagor to Third Person—Conversion.*] In consideration of a loan of money, G. [the mortgagor] by bill of sale conveyed his furniture, stock-in-trade, and other effects in and upon the farmhouse occupied by him, to the plaintiff, and all things of the like nature which might at any time during the continuance of the security be brought on the premises. The bill of sale contained provisoes that if the mortgagor should upon demand delivered to him or his assigns pay the

BILL OF SALE—*continued.*
amount secured the security should be void, and that in case he should make default in payment of the amount, or in case he should assign the goods or permit them to be removed from the premises before such payment, it should be lawful for the plaintiff to enter upon the premises and take possession of and sell the goods assigned. There was a further proviso that until the mortgagor or his assigns should make default, or do any act whereby the power of entry might be put in force, it should be lawful for him or his assigns to hold and possess the goods assigned. The mortgagor, while part of the consideration money remained unpaid, sold and delivered off his premises to the defendant part of the goods assigned. The plaintiff thereupon demanded these goods from the defendant, and upon his refusal to give them up, brought an action for their conversion. At the trial the jury found that the sale to the defendant was not in the ordinary course of business :—*Held*, that the defendant was liable, for upon the true construction of the bill of sale the sale and removal of the goods gave no title to the defendant as against the plaintiff. Payne *v.* Fern Q. B. D. 620

3. —— *Transfer — Assignment — Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8, 10.] A bill of sale of goods, which was duly registered, was given to secure 500*l.* with interest, part of which was at a subsequent date paid off. A deed was afterwards made between the two parties to the bill of sale, and the plaintiff, whereby the security was transferred and the goods assigned to him, on his paying off the amount remaining due on the bill of sale and making a further advance to the grantor, the whole amount secured by this deed being 501*l.* 15*s.* 9*d.*, with interest, and the rate of interest and the times of payment being different from those of the former deed :—*Held* (by Watkin Williams and Mathew, JJ.), that this deed was a transfer and not a new bill of sale, and need not be registered under the Bills of Sale Act, 1878, to be effectual as to the whole amount secured by it, against an execution creditor.—*Held*, by the Court of Appeal (Bramwell, Baggallay, and Lush, L.JJ.), that whether or not the deed was an effectual security, without registration, for the fresh advance, it was, as to the amount which remained due on the former bill of sale, a transfer and valid to that extent without registration under the Bills of Sale Act, 1878, so as to entitle the plaintiff to the goods. Horne *v.* Hughes (C. A.) Q. B. D. 676

4. —— *Bills of Sale Act*, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 8, 10—*Unregistered and Registered Bills of Sale—Priority.*] Chattels were assigned to the defendant by a bill of sale, which was not registered. The grantor subsequently gave another bill of sale comprising the chattels to the plaintiff, who registered it. The defendant afterwards took possession of the chattels under his bill of sale. In an action against him by the plaintiff for conversion :—*Held*, that the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), s. 10, enacting that "In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels," did not affect the priority of the unregistered bill of sale. Lyons *v.* Tucker - - - Q. B. D. 660

BOROUGH—Action against constable—Payment of costs incurred by him - - 135
See MUNICIPAL CORPORATION.

BUILDING SOCIETY—*Unincorporated—Certified Rules—Borrowing in excess of Prescribed Limit—Agent—Authority—Holding out by Society and Directors.*] By the certified rules of an unincorporated building society the directors might borrow money not exceeding a prescribed amount. Loans were made to the society through its secretary in accordance with advertisements, issued with the authority of the directors, that such loans might be so made by bringing the money to the office of the secretary. In each case a receipt was given by the secretary for the money as a loan to the society, with a written undertaking by him "to procure the promissory note of the directors for the loan," and afterwards in pursuance of such undertaking, the receipt was exchanged for such note, which always bore the date of the receipt. After an amount had been so borrowed exceeding the limit prescribed by the rules, the plaintiffs, who had on several previous occasions lent money to the society according to the above mode, paid a sum to the secretary as a loan to the society, and received from him the usual receipt and undertaking, but no promissory note of the directors was ever afterwards given, and the secretary absconded, appropriating that sum, with other moneys of the society, to his own use. In an action against the society and directors, the jury found that the society held out the secretary to the plaintiffs as having authority to receive the loan on their behalf on the terms on which it was received, and that the directors did the same:—*Held*, that such finding was bad in point of law as against the society, and that, as the limit for borrowing prescribed by the rules had been exceeded when the loan was made by the plaintiffs, the society, which had derived no benefit, was not liable for such loan:—*Held* (Bramwell, L.J., doubting), that although there was no fraud on the part of the directors they were personally liable to the plaintiffs for the money which had been so advanced. CHAPLEO *v.* BRUNSWICK PERMANENT BUILDING SOCIETY
[(C. A.) Q. B. D. 696

BURIAL—*Burial Acts* (15 & 16 *Vict. c.* 85; 16 & 17 *Vict. c.* 134)—*Burial Board—Grave—Grant in Perpetuity—Family Rights—Executor—Purchase of Grave.*] A burial board may, under the Burial Acts (15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134), grant a grave space to the grantee and his heirs, and the title to the burial rights under such grant will descend to the heirs of the grantee, and will not be vested in all members of the family of the grantee. MATTHEWS *v.* JEFFREY
[Ex. D. 290

2. —— *Dead Bodies cast on Shore from Sea—Tidal River—Liability of Parish*—48 *Geo.* 3, *c.* 75.] By 48 Geo. 3, c. 75, s. 1, the overseers of parishes throughout England in which any dead human bodies shall be found thrown in or cast on shore from the sea, by wreck or otherwise, are required to cause such bodies to be buried, and by s. 5, the overseers are to be reimbursed such expenses by the county treasurer. A steam-ship was sunk by collision in the river Thames, near Woolwich, at a place below low water mark, and a number of persons were drowned. Some of the bodies were found ashore within the boundaries of Woolwich in Kent, and were buried by the overseers. The river Thames at Woolwich and at the places where the bodies were found ashore is a navigable tidal river where great ships go:—*Held*, that the county treasurer could not be made liable for the expenses incurred by the overseers, for the bodies were not cast on shore "from the sea" within the meaning of the Act. OVERSEERS OF WOOLWICH *v.* ROBERTSON - Q. B. D. 654

CASES—*Alina, The* (5 Ex. D. 227), distinguished
See COUNTY COURT. [165
—— *Barker, In re* (7 H. & N. 109; 30 L. J. (Ex.) 404) followed - - - 548
See REVENUE.
—— *Brewer* v. *Jones* (10 Ex. 655) dissented from
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—— *Charlton* v. *Attorney-General* (4 App. Cas. 427) followed - - - 548
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—— *Dowse, The* (Law Rep. 3 A. & E. 135) followed - - - - 165
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—— *Hammack* v. *White* (11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129) upheld - - 145
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—— *Hocking* v. *Acraman* (12 M. & W. 170) commented on - - - - 84
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—— *Hunt* v. *Wimbledon Local Board* (4 C. P. D. 48) followed - - - 201
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—— *Lumley* v. *Gye* (2 E. & B. 216; 22 L. J. (Q.B.) 463) - - - - 333
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—— *Maybery* v. *Mansfield* (9 Q. B. 745) followed
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—— *Reg.* v. *Guardians of North Aylesford* (37 J. P. 148) explained - - 139
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—— *Stevens* v. *Midland Ry. Co.* (10 Ex. 352) not followed - - - - 287
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—— *Taylor* v. *Gillott* (Law Rep. 20 Eq. 682) followed - - - - 371
See BANKRUPTCY.
—— *Yewens* v. *Noakes* (6 Q. B. D. 530) explained
See REVENUE. [673

COMPANY—*Loan to—Agreement signed by Directors—Whether Directors personally liable.*] By agreement between the T. Company and the plaintiff, the defendants, describing themselves as "we the undersigned, three of the directors," agreed to repay 500*l.* advanced by the plaintiff "to the company," and assigned to the plaintiff as security for the advance certain "machines and tools," which were the property of the company:—*Held*, after hearing parol evidence to explain the ambiguity of the agreement, that the defendants were personally liable to repay the 500*l.* MCCOLLIN *v.* GILPIN (C. A.) Q. B. D. 516

CONSTABLE—Costs as defendant in action—Liability of borough fund - 135
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—— Corporation—Committee—Liability - 201
See LOCAL GOVERNMENT ACTS.
—— Procuring breach of—Master and servant
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CORPORATION—*Action against—Malicious Prosecution.*] An action for a malicious prosecution will lie against an incorporated company.—*Stevens* v. *Midland Ry. Co.* (10 Ex. 352) not followed.—The employment of policemen by a company to protect their property is an act within the scope of the incorporation of the company. EDWARDS *v.* THE MIDLAND RAILWAY COMPANY [Q. B. D. 287
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COSTS—Arbitration—Costs to abide "event"—General award—Reference back - 521
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—— Case stated by sessions—Practice - 139
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COUNTERFEIT MARK—Silver wares—Party grieved - - - - 21
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COUNTY—Dead bodies cast on shore by sea—Burial - - - - 654
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COUNTY COURT—*Admiralty Jurisdiction of—Action for Necessaries—British Ship—Owners domiciled in Great Britain—County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *s.* 2—*County Courts Admiralty Jurisdiction Amendment Act*, 1869 (32 & 33 *Vict. c.* 51), *ss.* 2, 3.] A county court having Admiralty jurisdiction has no greater jurisdiction in respect of a claim for necessaries than that possessed by the Admiralty Division of the High Court, and consequently cannot entertain an action for necessaries supplied to a British ship, the owners of which are domiciled in Great Britain.—*The Dowse* (Law Rep. 3 A. & E. 135), followed.—*The Alina* (5 Ex. D. 227) distinguished. ALLEN *v.* GARBUTT - - - - Q. B. D. 165
—— Admiralty jurisdiction—County Courts—Costs—Certificate - - - 46
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—— Appeal—Requesting judge to take note 508
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—— Costs—Solicitor and client—Claim for not more than 20*l.* - - - 607
See PRACTICE. 9.

COUNTY RATE—*Criminal Lunatic, Maintenance of—Upon what Funds chargeable*—3 & 4 *Vict. c.* 54, *s.* 2—27 & 28 *Vict. c.* 29, *s.* 2—*Prison Act*, 1877, 40 & 41 *Vict. c.* 21.] Notwithstanding the Prison Act, 1877, the expense of maintaining a prisoner removed to a lunatic asylum is chargeable by order of justices upon the county in which the prison for which he was removed is situate. THE QUEEN *v.* MEWS AND OASTLER - (C. A.) [Q. B. D. 47
—— Expenses of conveyance of prisoners - 156
See PRISON.

CRIMINAL LAW—*Bigamy—Duration of Life, Presumption of—Conflicting Presumptions.*] In 1864 W. married A. In 1868 he was charged with bigamy in marrying B. in 1868, his wife A. being then alive, and was on such charge convicted. In 1879 he married C., and in 1880, C. being then alive, he married D. Afterwards, upon a charge of bigamy in marrying D., C. being then alive, W. was convicted, it being held by the presiding judge that there was no evidence that A. was alive when W. married C., or that the marriage with C. was invalid by reason of A. being then alive:—*Held*, by the Court (Lord Coleridge, C.J., Lindley, Hawkins, Lopes, and Bowen, JJ.), that the conviction could not be sustained, as the question should have been left to the jury whether upon the above facts A. was alive or not when W. married C. REG. *v.* WILLSHIRE - - - (C. C. R.) Q. B. D. 366

2. —— *Manslaughter—Death caused by dangerous Act performed without proper Precautions—Fire-arms, negligent use of—Joint Wrongdoers.*] A., B., and C. went into a field in proximity to certain roads and houses, taking with them a rifle which would be deadly at a mile, for the purpose of practising firing with it. B. placed a board, which was handed to him by A., in the presence of C., in a tree in the field as a target. All three fired shots directed at the board so placed, from a distance of about 100 yards.—No precautions of any kind were taken to prevent danger from such firing.—One of the shots thus fired by one, though it was not proved by which one, of them, killed a boy in a tree in a garden near the field, at a spot distant 393 yards from the firing point. A., B., and C. were all found guilty by a jury of manslaughter:—*Held* by the Court (Lord Coleridge, C.J., Field, Lopes, Stephen, and Williams, JJ.), that A., B., and C. had been guilty of a breach of duty in firing at the spot in question, without taking proper precautions to prevent injury to others, and were rightly convicted of manslaughter. THE QUEEN *v.* SALMON, HANCOCK, AND SALMON - (C. C. R.) Q. B. D. 79

DEBT—Assignment of—Charge - - 626
See ASSIGNMENT OF DEBT.

DEFAMATION—*Privilege of Witness—Parliament—Select Committee of House of Commons.*] To an action of slander defendant pleaded that the statements complained of were part of the evidence given by him in the character of a witness before a Select Committee of the House of Commons:—*Held*, that the statements so made were privileged, and that the action would not lie. GOFFIN *v.* DONNELLY - - - - Q. B. D. 307

DEMURRAGE—Loading and unloading—Average rate - - - - - - 231
See SHIP.

ECCLESIASTICAL LAW—*Public Worship Regulation Act*, 1874 (37 & 38 *Vict. c.* 85), *ss.* 7, 9, 13, 16, 19—*Significavit, Power to issue, for Contempt —Requisition, Monition, and Inhibition, Form of —Absence of Statements shewing Jurisdiction— Forms given by Rules and Orders of* 1875, 1879, *of Statutory Authority — "Rules regulating Procedure" includes Forms of Proceedings—127th Canon not binding on Official Principal appointed by Public Worship Regulation Act*, 1874—*Style of Judge under Public Worship Regulation Act*, 1874 —*Requirement as to Place of hearing Cause—Writ de Contumace Capiendo issued in Vacation and not brought into Court—Petty Bag Act*, 12 & 13 *Vict. c.* 109, *s.* 26.] A representation under the Public Worship Regulation Act, 1874, was made in July, 1878, by the churchwardens of a parish to the bishop of the diocese, complaining of the incumbent for certain illegal practices in the conduct of divine worship. The bishop and archbishop being alternate patrons of the benefice, the bishop of the diocese of E. was appointed to act in the place of such bishop and archbishop in the matter of the representation under the 16th section of the above-mentioned Act. The bishop of E. having considered the representation sent a requisition to the judge under the Public Worship Regulation Act, 1874, requiring him to hear the case in London or Westminster, or within the diocese. The requisition followed as nearly as possible the form given by the rules and orders of 1875, issued under the Public Worship Regulation Act, 1874. It did not state that a copy of the representation had been sent to the party complained of, or that the parties had been required to state whether they would submit to the directions of the bishop touching the matter of the representation, as provided for by s. 9 of the Public Worship Regulation Act, 1874. It stated, however, that the parties had not stated within the prescribed time that that they were willing to submit to the directions of the bishop:—*Held*, by the Queen's Bench Division, that the requisition under the 9th section of the Public Worship Regulation Act must name the limits within which, under the section, the hearing is to take place, but need not name the particular place within such limits—that the requisition made by the Bishop of E. was valid, and that the form of it was sufficient on the following grounds, first, that it sufficiently shewed by necessary implication that the parties had been required to state whether they were willing to submit to the directions of the bishop; secondly, that it was not competent to the party complained of to object to the form of the requisition to the judge if all the facts essential to the jurisdiction in truth existed; and, thirdly, that the requisition was in substantial accordance with the form given by the rules and orders. This decision was not questioned on appeal.—The judge under the Public Worship Regulation Act proceeded to hear the matter of the above-mentioned representation, and issued a monition commanding the incumbent complained of to abstain from certain practices which he pronounced unlawful. The incumbent disregarded such monition, and continued the said

ECCLESIASTICAL LAW—*continued.*

practices, whereupon the judge issued an inhibition inhibiting the incumbent from the performance of divine service and the exercise of the cure of souls within the diocese for three months, and thereafter until the inhibition should be relaxed. The monition issued while the rules and orders of 1875 (1 P. & D. 1) were in force, but the inhibition issued after the amended rules of 1879 (4 P. & D. 250) had come into force. In the monition the judge was styled the official principal of the Arches Court of Canterbury (he having become such official principal under the 7th section of the Act upon the resignation of the previous official principal), but except in this respect the monition exactly followed the form given by the rules and orders of 1875. The inhibition exactly followed the form given by the rules and orders of 1879:—*Held*, by the Queen's Bench Division, that, assuming an official principal of the Arches Court of Canterbury to be within the 127th of the Canons of 1603, 1604, the judge under the Public Worship Regulation Act, 1874, was constituted by the 7th section of that Act upon the happening of a vacancy ex officio official principal of the Arches Court of Canterbury, without any obligation to take the oaths and subscribe the articles as required by that canon. This decision was not questioned on appeal:—*Held*, also, by the Queen's Bench Division, that the judge was rightly described in the monition as official principal of the Arches Court of Canterbury without setting forth how he became such official principal. This was not questioned on appeal:—*Held*, by the Queen's Bench Division and by the Court of Appeal, that the power given by the Public Worship Regulation Act, 1874, s. 19, to make rules and orders regulating the procedure under the Act, includes the power to make forms, and that consequently the forms given by the rules and orders of 1875 and 1879 are of statutory authority, and the monition and inhibition, whether they would have otherwise sufficiently shewn jurisdiction or not, were valid as being in accordance with the forms so given.—The incumbent disregarded the inhibition, and continued to exercise the cure of souls. The judge then issued a significavit against him for contempt. A writ de contumace capiendo was thereupon issued from the Petty Bag Office on the 29th of October, and recorded in the Queen's Bench on the following day (the Court not being then sitting), and delivered to the sheriff. Under this writ the incumbent was arrested and lodged in prison:—*Held*, by the Queen's Bench Division and by the Court of Appeal, that the judge under the Public Worship Regulation Act, 1874, is not the judge of a new court constituted by the Act, but is the official principal of the old Court of Arches, and has all the old powers of that Court, including the power of signifying for contempt if his orders are disobeyed, and that as the Act does not contain any special power of enforcing an inhibition issued under it, such inhibition can be enforced by significavit under 53 Geo. 3, c. 127:—*Held*, by the Queen's Bench Division, that the provisions of 5 Eliz. c. 23, s. 2, incorporated by 53 Geo. 3, c. 127, s. 1, that the writ de contumace capiendo, when brought into the Court of Queen's Bench, should there, in the presence of the justices, be opened and delivered of record to the sheriff, were

ECCLESIASTICAL LAW—*continued.*

impliedly repealed by the 26th section of the Petty Bag Act, 12 & 13 Vict. c. 109, and were not revived by the repeal of that section by 38 & 39 Vict. c. 66, and 42 & 43 Vict. c. 59; that the writ was effectual, and that the incumbent was lawfully arrested under it:—*Held*, on appeal, that though the Petty Bag Act authorized the issuing of the writ in vacation, it did not repeal the enactment that the writ should be opened in the Queen's Bench in the presence of the justices, and that as it had only been brought into the Crown Office at a time when the judges were not sitting, the requisitions of 53 Geo. 3, c. 127, had not been complied with, and the incumbent was entitled to be discharged from custody.—A monition commanded an incumbent, inter alia, to abstain from wearing in the administration of the Holy Communion the vestments known as an alb, a chasuble, and a biretta, and from all practices, acts, matters, and things of the same or a like nature to those thereinbefore particularly set forth, or any of them, or from unlawfully permitting the same, or any of them. The inhibition stated that the incumbent had failed to obey the monition in regard to the matters therein mentioned, and proceeded to specify various acts, most of which were expressly forbidden by the monition, and also that the incumbent had permitted his curate to wear at the Communion Service certain unlawful ecclesiastical vestments, to wit, a biretta and a stole, and it inhibited him from officiating for three months, and thereafter until the inhibition should be relaxed:—*Held*, that it was within the jurisdiction of the judge to decide whether the wearing a stole was not an unlawful act of the same or a like nature to those mentioned in the monition; that if he had decided wrongly the case was one for appeal, and that even if the Act gave no appeal in such a case, that was no ground for saying that the judge had exceeded his jurisdiction. A prohibition to restrain proceedings on the inhibition was therefore refused.—Whether the including among the grounds of the inhibition an act not prohibited by the monition along with acts which were so prohibited would make the inhibition invalid—*quære*. DALE'S CASE. ENRAGHT'S CASE [(C. A.) Q. B. D. 376

ELECTION — Municipal corporation — Corrupt practices - - - - 323
See MUNICIPAL CORPORATION.

ELEGIT—Application for receiver - - 75
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ELEMENTARY EDUCATION ACTS—*Attendance Order—Child attending Board School without Fees—Liability of Parent*—39 & 40 *Vict.* c. 79, *ss.* 10, 11, 12; 33 & 34 *Vict.* c. 75, *s.* 17.] A parent who, under an order by a court of summary jurisdiction that his child shall attend a board school and that he do see that the order is complied with, causes the child to attend the school but without the school fees, is not liable to conviction under the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 12, for non-compliance with the order, although he may have failed to apply to the guardians under s. 10, to pay the fees, and refused to obtain a remission of them under 33 & 34 Vict. c. 75, s. 17. RICHARDSON *v.* SAUNDERS [Q. B. D. 313

EMPLOYER AND WORKMEN—*Employers and Workmen Act*, 1875 (38 & 39 *Vict.* c. 90), *s.* 11—*Contract of Service—Wages due but not payable—Piece Work—Forfeiture of Wages—Women.*] A weaver, a woman subject to the provisions of the Factory Acts, was employed at a mill in which amongst the rules were rule 15, that no person shall leave his or her work without giving fourteen days' previous notice, such notice to be given on a Saturday, and rule 16, that any person leaving without giving such notice "shall forfeit all wages then due, or earned, or unpaid." She was paid by the piece and all work done was booked up at three o'clock on the Wednesday afternoon in each week, and paid for on the following Saturday, all work booked after three o'clock on the Wednesday afternoon being carried forward to the following week. She left the mill before three o'clock on a Wednesday afternoon without giving the required notice, having previously carried in and had booked certain work which she had completed. On the following Saturday she applied for the wages due at the time she left and when she had completed her work, but payment was refused on the ground that the same were forfeited by rules 15 and 16. No claim was, however, made for damage sustained by the employer.—The 11th section of the Employers and Workmen Act, 1875, enacts that "in the case of a child, young person, or woman, subject to the provisions of the Factory Acts, any forfeiture on the ground of absence or leaving work shall not be deducted from or set off against a claim for wages or other sum due for work done before such absence or leaving work, except to the amount of the damage, if any, which the employer may have sustained by reason of such absence or leaving work":—*Held*, that the above facts did not shew a weekly hiring at weekly wages, but shewed that the price for the work done and booked when the weaver left on the Wednesday was then earned and due, though not then payable, and that the same would have been forfeited by rules 15 and 16, but that as there was no damage and the weaver was a woman subject to the Factory Acts she was protected by the said 11th section, and could not be deprived of what she had so earned. WARBURTON *v.* HEYWORTH - - - - Q. B. D. 1

2. —— 38 & 39 *Vict.* c. 90, *ss.* 4, 10—"*Workman*"—*Potter's Printer—Breach of his Contract through Strike of Assistants employed by him.*] By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4, "a dispute under this Act between an employer and a workman may be heard and determined by a court of summary jurisdiction, and such Court, for the purposes of this Act, shall be deemed to be a court of civil jurisdiction" limited to 10*l*. By s. 10 "In this Act the expression 'workman,' . . . means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, . . . has entered into, or works under a contract with an employer, whether the contract be . . . a contract of service or a contract personally to execute any work or labour."—The expression "court of summary jurisdiction" means (inter alia) a stipendiary magistrate:—*Held*, that a potter's printer, under a contract with his employers to do work in which he was assisted by "transferrers" whom he

EMPLOYER AND WORKMEN—*continued.*
himself engaged and paid, was a "workman" within the Act, and liable in proceedings before a magistrate to pay damages for a breach of his contract with his employers, caused by his transferrers' refusal to do the work, although he was ready and willing to do it. GRAINGER *v.* AYNESLEY. BROMLEY *v.* TAMS - - - - - C. P. D. 182

ESTOPPEL — *Res judicata — Justices, Summary Proceedings before—Adjudication that Street is a Highway—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] An application to justices by a local board under the Public Health Act, 1875, for the recovery of a proportion of the expenses of sewering a street from the owner of premises abutting thereon, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. The local board some years afterwards made an application against the same person for the recovery of a proportion of paving expenses subsequently incurred in respect of the same street, and a stipendiary magistrate made an order for the payment of such expenses:—*Held*, that the adjudication of the justices that the street was a highway repairable by the inhabitants at large on the first application was beyond the jurisdiction of such justices, which was only to make or refuse the order for the expenses claimed, and that, therefore, such adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application, and consequently that the magistrate might make the order which he made for their payment. THE QUEEN *v.* HUTCHINGS - - - - - Q. B. D. 300

EVIDENCE—Negligence—Carriage and driver
See NEGLIGENCE. [145

—— Presumption of duration of life - 366
See CRIMINAL LAW—BIGAMY.

FLANGEWHEEL—User upon tramway - 70
See TRAMWAY.

FREIGHT—Payment in advance—Insurance 648
See INSURANCE (MARINE). 2.

GARNISHEE—Partnership firm—Description by name - - - - - - 631
See PRACTICE.

GRAVE—Grant in perpetuity - - 290
See BURIAL.

GRAZING, RIGHT OF—Poor-rate—Occupation
See POOR-RATE. [10

HIGHWAY—*Licence to get Materials for repair of — 5 & 6 Wm. 4, c. 50, s. 54—"Search for, dig, and get in or through"— Avenue to a House.*] A license may be granted to get materials for the repair of the highways under 5 & 6 Wm. 4, c. 50, s. 54, although the materials when got must be carried away by an "avenue to a house," the exception of such an avenue (inter alia) in the section referring only to the digging or getting of the materials, not to the carrying of them away when got. RAMSDEN *v.* YEATES - Q. B. D. 583

2. —— *Repair — Disturnpiked Roads—Main Roads—Highways and Locomotives (Amendment, Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.] The Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), by s. 13 enacts that any road which has "between the 31st of December, 1870, and the date of this Act ceased to be a turnpike road . . . shall be deemed to be a main road, and one half of the expenses incurred from and after the 29th of September, 1878, by the highway authority in the maintenance of such road, shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate, out of the county rate."—The corporation of the town and borough of R. were the highway authority of the R. highway area. Under ss. 47–50 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), such portions of the turnpike roads entering R. as came within the area of the "town" were taken out of the turnpike trusts, and the obligation to repair the same was imposed upon the corporation. By a local Act in 1872 the boundaries of the borough were enlarged, and all the provisions of the Acts relating to the "town" were made applicable to the enlarged area of the borough. The effect was that the further portions of the turnpike roads thus for the first time brought within the area of the borough were taken out of the turnpike trusts by the operation of the Towns Improvement Clauses Act, 1847, and ceased to be turnpike roads:—*Held*, by Watkin Williams and Mathew, JJ., that the further portions of the turnpike roads brought within the enlarged borough area by the local Act of 1872, though they had ceased to form parts of the turnpike roads, were not main roads within s. 13 of the Highways and Locomotives (Amendment) Act, 1878, since that section contemplated only the cesser or extinguishment and winding-up of turnpike trusts, and did not apply to a case where the portions of roads in question only ceased incidentally to form part of the turnpike trusts. MAYOR OF ROCHDALE *v.* JUSTICES OF LANCASTER [Q. B. D. 525

3. —— *Highways and Locomotives Amendment Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23.—*Extraordinary Expenses — Excessive Weight — Traffic from recognised Business in Neighbourhood.*] Upon the hearing of a complaint made by a highway board under the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77), s. 23, for the purpose of recovering from the appellant extraordinary expenses incurred by the board by reason of traffic conducted by him, it appeared that he was owner or occupier of stone quarries in the district, and that the stone was conveyed in heavy loads over the highways, so as to make the cost of repairing them much larger than if they had been subject to ordinary agricultural traffic; but that the stone traffic was a recognised business in the neighbourhood, and the waggon loads of the usual weight in such traffic. The justices having upon these facts found, first, that the traffic was not extraordinary, secondly, that the weights were excessive, and thirdly, that the expenses were extraordinary:—*Held*, that the first finding, which was warranted by the evidence, shewed that the expenses were not "extraor-

HIGHWAY—*continued.*
dinary" within the meaning of the section, and that they could not be recovered from the appellant. Wallington *v.* Hoskins - Q. B. D. 206

—— Houses abutting upon—Subsidence of land
See Local Government Act. [264

HOUSE DUTY—Exemption—"Servant or other person" - - - - 673
See Revenue.

HUSBAND AND WIFE—*Married Woman—Acknowledgment of Deed under 3 & 4 Wm. c. 74, s. 84—Varying the Certificate by omitting the Words "of full Age."*] By order of a Vice-Chancellor indentures of settlement were directed to be executed by a married woman who was an infant. The Court allowed the certificate of acknowledgment under 3 & 4 Wm. 4, c. 74, s. 84, to be varied by omitting the words "of full age." In the Matter of Mary Geraldine Lacey C. P. D. 154

2. —— *Articles of Settlement—Infant—Married Woman suing alone — Trust Property — Order XVI., rule 8—Jus tertii.*] The plaintiff's husband, who married her when he was an infant of about seventeen, agreed in writing shortly before the marriage. and in consideration of the same, to assign all her property to a trustee for her sole and separate use. At the time of the marriage the plaintiff was possessed of some leasehold property in her own right, and of other leasehold property in trust for her son by a former marriage, and the defendant was her agent appointed by her to receive the rents of the said leasehold property, and as such agent he received the rents both before and after the last marriage. Immediately after the last marriage the plaintiff was deserted by her husband, and she obtained a protection order from a police magistrate, under 20 & 21 Vict. c. 85, s. 21, protecting all her earnings and property acquired since the desertion. The action was brought by the plaintiff alone without her husband (who was still an infant) for the rents received by the defendant after the marriage. The husband made no claim to any of the rents, but the defendant having had notice of the marriage, refused to pay them to the plaintiff; and he applied to stay the action until the plaintiff added a next friend or gave security for costs. This application was refused at chambers, and on appeal by a Divisional Court:—*Held*, that the agreement to assign was void as against the infant husband.—*Held*, also, that the protection order did not apply, but that the effect of the refusal of the Court to stay the action on the defendant's application, was to give leave to the plaintiff to sue alone without her husband, in exercise of the authority given to a Court or judge by Order XVI., rule 8, and which might be so exercised after action brought, and that therefore the plaintiff was entitled to sue alone and to recover the money received from the property of which she was trustee:—*Held*, however, by Lord Selborne, L.C., and Baggallay, L.J., that the agreement to assign being void against her husband she could not recover the money received from the property which belonged to her absolutely before her last marriage:—*Held*, by Brett, L.J., that she could, since the husband had made no claim, and therefore the defendant, who

HUSBAND AND WIFE—*continued.*
was not defending by his authority, could not set up the husband's right as an answer to the action. Kingsman *v.* Kingsman - (C. A.) C. P. D. 122

—— Policy of insurance—Felonious act of wife of assured - - - - 561
See Insurance (Fire.)

INFANT — Marriage settlement — Minority of husband—Wife suing alone - 122
See Husband and Wife. 2.

INJUNCTION—Contract for exclusive personal service—Procuring breach of contract
See Master and Servant. [333

INSURANCE (FIRE) — *Loss occasioned by the felonious Act of the Wife of the Assured—Rights of the Insurer—Risks covered by Policy—Felony—Action maintainable without shewing that Felon prosecuted.*] An insurance company granted a fire policy to S., and during the currency of the policy S.'s wife feloniously burnt the property insured. The company, not admitting any claim on the policy, brought an action against S. and his wife for the damage done by the act of the wife:—*Held*, First, that the action could not be maintained, as the insurer has no rights other than those of his assured, and can enforce those only in his name and after admitting the claim on the policy. Secondly, that the action for the felony if it were maintainable was maintainable without shewing that the felon had been prosecuted.—*Semble*, that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy. Midland Insurance Company *v.* Smith and Wife - Q. B. D. 561

INSURANCE (LIFE) — *Injury by Accident — Drowning—Epileptic Fit—Construction of Policy.*] W. effected an insurance with the defendants against accidental injury, and by the terms of the policy the defendants agreed to pay the amount insured to W.'s legal representatives, should he sustain "any personal injury caused by accidental, external, and visible means," and the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend "to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease." During the time the policy was in force, and whilst he was crossing and fording a stream, W. was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, but he did not sustain any personal injury to occasion death other than drowning:—*Held*, that W.'s death was occasioned by an injury within the risk covered by the policy, and to which the proviso did not apply. Winspear *v.* Accident Insurance Company, Limited [(C.A.) Ex. D. 42

INSURANCE (MARINE) — *General Words — Explosion of Boiler of Steamer, whether a Peril insured against—Contributory cause of Loss, and proximate Cause.*] The explosion of the boiler of a steamer is a peril insured against by a marine policy in the ordinary form.—A steamer insured by a time policy became a wreck, by reason of the explosion of her boiler in ordinary weather under ordinary pressure of steam. The causa

INSURANCE (MARINE)—*continued.*

sine quâ non of the explosion was that the boiler had become, from external and internal corrosion by bilge water and "scale," too thin to resist the steam. The corrosion might have been discovered, and in some measure prevented, by ordinary care: —*Held*, affirming the judgment of Baggallay, L.J., that though unseaworthiness was a causa sine quâ non of the loss, the explosion was a proximate cause, and a peril insured against. WEST INDIA AND PANAMA TELEGRAPH COMPANY *v.* HOME AND COLONIAL MARINE INSURANCE COMPANY [(C. A.) C. P. D. 51

2. —— *Policy—Freight—Loss by Perils of the Seas.*] The plaintiffs were the owners of a steamship named the *P.*, which was chartered to the Commissioners of the Admiralty for transport service for three months certain at an agreed freight, which was not to be payable in the event of the steamship becoming unseaworthy or unfit to perform the service for which she was chartered. One month's freight was to be paid to the plaintiffs in advance. The plaintiffs effected with the defendants a policy of insurance in the ordinary form upon freight.—The *P.* sailed under the charter to the Admiralty with troops for South Africa, and soon after the expiration of the first month of the period for which she was chartered she struck on a rock, and was so damaged as to become unseaworthy and unfit to perform the service for which she had been chartered. She was thereupon discharged from the service of the Admiralty:—*Held*, that the plaintiffs could not recover from the defendants the residue of the freight, which the *P.* would have earned during the time covered by the policy. INMAN STEAMSHIP COMPANY *v.* BISCHOFF - (C. A.) Q. B. D. 648

3. —— *Open Policies—Declaration of Shipments at less than real Value—Concealment of material Fact—Policies set aside.*] The concealment by the assured at the time of effecting a marine policy of insurance of a fact which is material to enable a rational underwriter, governing himself by the principles on which underwriters in practice act, to judge whether he shall accept the risk at all, or at what rate, will vitiate the policy, although the fact may not be material with regard to the risk insured.—The defendants effected with the plaintiff, a Lloyd's underwriter, a series of open policies for certain specified sums to cover shipments to be declared and valued as interest might appear. The policies were effected at different dates, and were to succeed each other in the order of date. The value of the shipments were declared at considerably less than their real value, so that when the later policies were effected the earlier policies were in fact more exhausted than they would appear to be from the declarations. The undervaluation of the shipments was systematically and fraudulently made by the defendants, and the fact that they had been so undervalued was concealed from the plaintiff when he underwrote the later policies:—*Held*, that, under these circumstances, a jury would be justified in finding that the concealment was of a fact of which it was material that the plaintiff should have been informed, in order to guide him in deciding whether he would underwrite these later policies or not or at what rate; and that on

INSURANCE (MARINE)—*continued.*

the jury so finding the plaintiff was entitled to have such later policies set aside and cancelled. RIVAZ *v.* GERUSSI - - (C. A.) Q. B. D. 222

4. —— *Valued Policies—War—Destruction of Cargo by Enemy — Compensation paid by one Sovereign State to another — Right of Injured Party to Money so paid—Salvage—Indemnity.*] The plaintiffs, underwriters, granted to the defendants valued policies of insurance, including war risks, on a cargo of a United States merchant ship. Such cargo during the insured voyage was totally destroyed by the *Alabama*, a cruiser of the Confederate States then at war with the United States of America; and the plaintiffs paid to the defendants, as and for an actual total loss, the amounts named in the policies, but the real value of the cargo exceeded the sum so paid.—The loss of this cargo formed one of the items of claims made by the United States against Great Britain, in respect of the damage done by the *Alabama* and other confederate cruisers, which was referred to arbitration, and resulted in an award under which Great Britain paid the sum awarded for compensation to the United States. Afterwards the United States passed an Act of Congress for constituting a Court for the distribution of this sum amongst its subjects who had been injured and whose claims should be allowed by that Court under the provisions of such Act, by which it was declared in effect that no claim should be allowed for which the party injured had received compensation from any insurer; but that if such compensation should be not equal to the loss actually suffered, allowance might be made for the difference; and that no claim should be allowed by or on behalf of any insurer, either in his own right or of that of the party insured. —The defendants claimed in such Court and received a sum out of such compensation money for so much of their loss as exceeded the sum insured. The plaintiffs, having paid for a total loss, sued the defendants for the compensation-money they had so received:—*Held* (Baggallay, L.J., dissenting), that this money was no part of the salvage, but was given to the defendants under the Act of Congress as a pure gift, and that therefore the plaintiffs were not entitled to recover it. BURNAND *v.* RODOCANACHI (C. A.) Q. B. D. 633

INTEREST—Justices of peace—Disqualification —Municipal corporation - - 168
See JUSTICES OF THE PEACE.

INTERPLEADER—Trial by judge without jury
See PRACTICE. 12. [63

JURISDICTION—County Court—Admiralty 165
See COUNTY COURT.

—— Judge under Public Worship Regulation Act
See ECCLESIASTICAL LAW. [376

JUSTICES—Landlord and tenant — Fraudulent removal—Notice of appeal - 669
See LANDLORD AND TENANT.

JUSTICES OF THE PEACE—*Interest disqualifying—Urban Sanitary Authority—Municipal Corporation—Summons issued by Member of Corporation.*] By a local Act for the improvement of a borough the corporation was made the authority for the execution of the Act, with power to direct

JUSTICES OF THE PEACE—*continued.*

prosecutions for this purpose. An information for an offence under the Act having been preferred by an officer on behalf of the corporation, a summons was issued upon it by a justice, who was also an alderman and member of the corporation, but came on for hearing before justices, none of whom were connected with the corporation:—*Held*, notwithstanding, that such justices could not proceed with the hearing of the summons, for it had been issued by one who was virtually prosecutor. THE QUEEN *v.* GIBBON - **Q. B. D. 168**

LANDLORD AND TENANT—*Fraudulent Removal of Goods*—11 *Geo.* 2, *c.* 19, *ss.* 4, 5; 12 *&* 13 *Vict. c.* 45, *s.* 1; 42 *&* 43 *Vict. c.* 49, *s.* 31, *sub-s.* 2, *s.* 32.] An appeal from an order of justices under 11 Geo. 2, c. 19, ss. 4, 5, by a person adjudged guilty of fraudulently removing goods to prevent a distress, is subject to the conditions and regulations prescribed in the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 31, sub-s. 2, and s. 32, and therefore notice of appeal must be given within seven days after the decision appealed against. REG. *v.* JUSTICES OF SHROPSHIRE **[Q. B. D. 669**

—— Bankruptcy of lessee after granting sublease—Disclaimer - - - **371**
See BANKRUPTCY.

LIMITATIONS—3 *&* 4 *Wm.* 4, *c.* 27, *and* 1 *Vict. c.* 28—*Mortgage—Order of Foreclosure Absolute—Judicature Act*, 1873—*Ejectment.*] The effect of an order of foreclosure absolute obtained by a legal mortgagee is to vest the ownership and beneficial title to the mortgaged land for the first time in the mortgagee; so that an action, brought within twenty years next after the order of foreclosure, by the mortgagee to recover possession of such land, was held, since the Judicature Act, 1873, to be not barred by the Statutes of Limitations (3 & 4 Wm. 4, c. 27 & 1 Vict. c. 28), although more than twenty years had elapsed since the legal estate in the land had been conveyed to the mortgagee, and since the last payment of principal or interest secured by the mortgage. HEATH *v.* PUGH **(C. A.) C. P. D. 345**

LOCAL GOVERNMENT ACTS—*Highway—Houses abutting—Subsidence of Land—Raising of Road by Local Board—Raising of Houses by Owners—Compensation for Cost of—Liability of Local Board*—38 *&* 39 *Vict. c.* 55 (*Public Health Act*, 1875), *ss.* 144, 149, 179, 308.] The plaintiffs were owners of houses abutting on a highway which was vested in the defendants, a local board acting under 38 & 39 Vict. c. 55 (Public Health Act, 1875), and having the powers and liabilities of surveyor of highways. The abstraction of salt from a bed beneath them caused from time to time a subsidence of the ground upon which the houses and highway were situate. The houses were rebuilt in 1870 on timber, so that they might be raised by screwjacks. In 1876 the surface of the highway in front of the houses had subsided considerably, and the houses had subsided with it. The surface of the roadway remained continuous, so that traffic could pass along it as before; but the roadway was in a curved hollow, and at the level to which it had subsided was

LOCAL GOVERNMENT ACTS—*continued.*

liable to be flooded, and in fact was flooded at times, so as to render traffic impossible. The defendants put materials on the roadway, so as to make the surface immediately above the point of the lowest subsidence about 4 ft. 3 in. higher than it was at the commencement of the work. The plaintiffs, having had notice from the defendants, raised their houses simultaneously with the works to the roadway, and then claimed under s. 308 of the Act, and were awarded compensation for the cost of raising the houses.—Having regard to the obstruction to traffic caused by floods, the raising of the road was reasonably necessary to put it in a proper state for traffic; but, excluding the consideration of floods, the raising of the road to the extent described, though a reasonable and prudent act, was not necessary to put the road into a proper state for traffic:—*Held*, that as the highway was vested in the defendants, no action of trespass could have been maintained by the plaintiffs, even if more materials had been placed on the road than a surveyor of highways could justify, and that the plaintiffs had no right to have the road maintained at the level to which it accidentally and recently sank; and that the works of the defendants were not done "in exercise of any of the powers" of the Act within the terms of s. 308—which mean powers created by the Act, and not simply powers transferred by s. 144 from the surveyor to the local board—but were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have, and, consequently, that the plaintiffs were not entitled to compensation. BURGESS *v.* NORTHWICH LOCAL BOARD - - **C. P. D. 264**

2. —— *Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 174, 200—*Urban Authority—Contract exceeding* 50*l. in Value or Amount not under Seal—Corporation.*] Scarlet fever having broken out, an urban sanitary authority appointed a committee under s. 200 of the Public Health Act, 1875 (38 & 39 Vict. c. 55). A medical man agreed verbally with the committee to attend the patients at the rate of 5*s.* 3*d.* per tent per day, and attended until the amount due was nearly 100*l.*:—*Held*, by Stephen, J., that the committee were not liable as such, because they were forbidden to contract by s. 200 of the Act, and were not liable individually, because the contract was not with the members of the committee personally; and that since eventually more than 50*l.* became due it was a "contract whereof the value or amount exceeded 50*l.*" within s. 174 of the Act and ought to have been under seal, and that not being under seal no action lay on it against the urban authority, though they had had all the benefit of it.—*Hunt* v. *Wimbledon Local Board* (4 C. P. D. 48) followed. EATON *v.* BASKER, MAYOR, &C., OF GRANTHAM - - **Ex. D. 201**

3. —— *Public Health Act*, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 94, 96—*Notice to abate Nuisance—Order of Justices—Works necessary for the Purpose.*] A nuisance existed consisting of a privy and ashpit in such a state as to be a nuisance, and the local sanitary authority gave notice to the owner under the Public Health Act, 1875, s. 94, to abate the same, and for that purpose to

LOCAL GOVERNMENT ACTS—*continued.*
fill up the ashpit, abandon the privy, and build a pail closet. The owner failed to do so, and justices thereupon, under s. 96, ordered the owner to fill up the ashpit, to abandon the privy, and to construct a proper and sufficient pail closet in lieu thereof. On a rule for a certiorari to quash the order of justices:—*Held*, by Pollock, B., and Stephen, J., that the order was bad, as the justices had no power under s. 96 to order the erection of the pail closet. EX PARTE WHITCHURCH [Q. B. D. 545

—— Municipal corporation—Local authority—Justice member of corporation—Disqualification - - - 168
See JUSTICES OF THE PEACE.

LUNATIC—Maintenance of criminal lunatic 47
See COUNTY RATE.

MALICIOUS PROSECUTION—Action against corporation - - - - 287
See CORPORATION.

MANSLAUGHTER—Negligent use of firearms 79
See CRIMINAL LAW—MANSLAUGHTER.

MARRIAGE—Breach of promise—Pleading—Matter of aggravation - - 190
See PRACTICE. 16.

MARRIED WOMAN—Acknowledgment of deed under Fines and Recoveries Act—Order to vary form of certificate - - 154
See HUSBAND AND WIFE.

—— Minority of husband—Articles of settlement—Wife suing alone - - 122
See HUSBAND AND WIFE. 2.

MASTER AND SERVANT—*Contract for Exclusive Personal Service—Action for procuring a Breach of such Contract—Damages where Injunction only claimed*—21 & 22 *Vict. c.* 27, *s.* 2.] An action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and employed.—So *held* by Lord Selborne, L.C., and Brett, L.J., affirming the decision of the majority of the judges in *Lumley* v. *Gye* (2 E. & B. 216; 22 L. J. (Q.B.) 463), Lord Coleridge, C.J., dissentient.—Where in such an action the employed was also a defendant, but as against him the plaintiff claimed only an injunction and not damages, it was held that damages might, in the discretion of the Court, be given under Lord Cairns' Act (21 & 22 Vict. c. 27), and that the jury, therefore, should be directed by the judge, in the event of a verdict for the plaintiff, to find such damages as should be awarded; first, if the Court should think it a proper case both for injunction and damages; and secondly, if the Court should think it a proper case for damages only, and not also for an injunction. BOWEN *v.* HALL (C. A.) Q. B. D. 333

—— Breach of contract—Summary jurisdiction
See EMPLOYER AND WORKMEN. 2. [182

—— Contract of service—Wages—Forfeiture 1
See EMPLOYER AND WORKMEN.

METROPOLITAN BUILDING ACT, 1855 (18 & 19 *Vict. c.* 122), *Part II., ss.* 73, 97—*Dangerous Structure—Party Wall—Complaint against one Owner—Expenses incurred by Board of Works—Reasonableness of Charges.*] A structure within the metropolis having been surveyed by the Board of Works under 18 & 19 Vict. c. 122, ss. 69, 73, an order was made by a magistrate for the owner to take down or otherwise secure the party walls. Upon his default the board themselves executed the works and took out a summons against the owner for the expenses incurred:—*Held*, first, that upon the hearing of such summons the owner could not object to his being made liable for expenses actually incurred, by merely shewing that they included items which were in excess of the market price of labour and materials at the date of the execution of the works. Secondly, that he could not require that the other owners of the party walls should be summoned in order that the expenses might be distributed among them. DEBENHAM *v.* METROPOLITAN BOARD OF WORKS [Q. B. D. 112

MONEY PAID—*Mistake of Fact—Delay in reclaiming—Alteration of Position of Payee.*] The plaintiff, by mistake, paid to the defendants, who were owners of the tithes of a parish, tithe rent-charge in respect of lands not in his occupation. The plaintiff did not discover the mistake until the two years limited by 6 & 7 Wm. 4, c. 71, for the recovery of a tithe rent-charge had expired and the defendants had lost their remedy for the arrears against the lands actually chargeable:—*Held*, that there was no duty cast on the plaintiff in relation to the defendants which made his delay in discovering the mistake laches on his part; and that he was entitled to recover back the amount paid as money paid under a mistake of fact. DURRANT *v.* ECCLESIASTICAL COMMISSIONERS FOR ENGLAND AND WALES - - - Ex. D. 234

MORTGAGE—Order of foreclosure absolute 345
See LIMITATIONS.

MUNICIPAL CORPORATION—*Constable, Costs of Action for Malicious Prosecution against—Borough Fund and Rates, Illegal Charge upon—Municipal Corporation Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 82.] The chief constable of a borough having, by the direction of borough magistrates, laid an information against a person for conspiracy, an action for malicious prosecution was brought by such person against him and a verdict recovered for 200*l.*:—*Held*, that it was not competent to the town council to order payment of the chief constable's costs out of the borough fund or rate under 5 & 6 Wm. 4, c. 76, s. 82. THE QUEEN *v.* MAYOR, &C., OF EXETER - - - - Q. B. D. 135

2. —— *Election Petition—Corrupt Practices* (*Municipal Elections*) *Act*, 1872 (35 & 36 *Vict. c.* 60), *s.* 13, *subs.* 6—*Mayor made Respondent in a Petition—Returning Officer—Complaint of Conduct of—Ballot Act* (35 & 36 *Vict. c.* 33), *s.* 20—*Municipal Corporations Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 43—*Municipal Election Petition Rules*, 1872, *rule* 44—*Judicature Act*, 1873, s. 19.] Where a mayor had bonâ fide given a decision under 38 & 39 Vict. c. 40, s. 1, subs. 3, on the validity of an objection made to a nomination paper, a complaint of such decision as erroneous is not a "complaint of the conduct" of such mayor within the meaning of

MUNICIPAL CORPORATION—*continued.*

35 & 36 Vict. c. 60, s. 13, subs. 6.—At the election of a councillor for a ward in a borough the mayor is not the returning officer within the meaning of s. 20 of the Ballot Act, unless he also happens to be alderman of such ward, or unless the office of alderman in such ward be vacant.—From an order of a divisional court upon an interlocutory matter arising in an election petition, an appeal lies to the Court of Appeal. HARMON *v.* PARK [(C. A.) C. P. D. 323

—— Information for penalties—Justice member of corporation—Interest - - 168
See JUSTICES OF THE PEACE.

NECESSARIES—Action for—Admiralty—County Court - - - - 165
See COUNTY COURT.

NEGLIGENCE—*Driving Carriage in a Public Thoroughfare.*] A horse drawing a brougham under the care of the defendant's coachman in a public street, suddenly and without any explainable cause bolted, and, notwithstanding the utmost efforts of the driver to control, swerved on to the footway and injured the plaintiff:—*Held*, no evidence of negligence to go to a jury.—*And held*, that the fact that the horse had cast a shoe shortly after he bolted, and that the driver did not under the circumstances in which he was placed call out or give any warning, did not alter the case.—*Hammack* v. *White* (11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129), upheld. MANZONI *v.* DOUGLAS [C. P. D. 145

2. —— *Jobmaster—Defect in Carriage—Warranty of fitness.*] The plaintiff hired from the defendant, a jobmaster, for a specified journey, a carriage, a pair of horses, and a driver. During the journey a bolt in the underpart of the carriage broke, the splinter bar became displaced, the horses started off, the carriage was upset, and the plaintiff injured. In an action against the defendant for negligence, the jury were directed that, if in their opinion the defendant took all reasonable care to provide a fit and proper carriage, their verdict ought to be for him. The jury found a verdict for the defendant, and in particular that the carriage was reasonably fit for the purpose for which it was hired, and that the defect in the bolt could not have been discovered by the defendant by ordinary care and attention:—*Held*, that the direction was wrong, for that it was the duty of the defendant to supply a carriage as fit for the purpose for which it was hired as care and skill could render it, and the evidence was not such as to shew that the breakage of the bolt was, in the proper sense of the word, an accident not preventible by any care or skill, or to warrant the finding of the jury that the carriage was reasonably fit for the purpose for which it was hired. HYMAN *v.* NYE - - - Q. B. D. 685

3. —— *Master and Servant — Solicitor and Clerk—Scope of Authority.*] The plaintiffs occupied premises beneath the offices of the defendants who were solicitors. One of the defendants had a room of the offices, and in it was a lavatory for his own use exclusively, and his orders to his clerks were that no clerk should come into his room after he had left. A clerk went into the room to

NEGLIGENCE—*continued.*

wash his hands at the lavatory after his employer had left, turned the water tap, and negligently left it so that water flowed from it into the plaintiffs' premises and damaged them.—In an action for negligence:—*Held*, that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and that there was no evidence of negligence for which the defendants were liable. STEVENS *v.* WOODWARD - - - - Q. B. D. 318

—— Injury to cattle—Liability to fence - 237
See RAILWAY. 3.

NUISANCE—Abatement—Public Health Act 545
See LOCAL GOVERNMENT ACTS. 3.

PARLIAMENT—Committee—Privilege of witness
See DEFAMATION. [307

PARTY WALL—Metropolitan Building Act 112
See METROPOLITAN BUILDING ACT.

PASSENGERS DUTY—Railway—Sleeping accommodation - - - - 216
See REVENUE. 4.

PLEADING—Action for recovery of land - 645
See PRACTICE. 15.

—— Breach of promise of marriage — Special damage - - - - 190
See PRACTICE. 16.

PENALTIES, ACTION FOR—*Limitation of Time —Selling Silver Wares with Counterfeit Mark— "Party grieved"—7 & 8 Vict. c. 22, s. 3—3 & 4 Wm. 4, c. 42, s. 3.*] An action by an officer of one of the companies of Goldsmiths mentioned in 7 & 8 Vict. c. 22, for penalties under s. 3 of that Act, is an action by a "party grieved" within 3 & 4 Wm. 4, c. 42, s. 3, and consequently cannot be brought more than two years after the cause of action accrued. ROBINSON *v.* CURREY [Q. B. D. 21

POOR LAW—*Appeal against Rate — Reasonable Time for giving Notice of Appeal—Entry of Appeal—Next Sessions—17 Geo. 2, c. 38, s. 4.*] A poor rate for the parish of L. was made and allowed on Saturday, the 20th of March, and published on the following day. S. & Son, who are the occupiers of bookstalls at certain railway stations in the parish, were included in the rate. The quarter sessions next after the publication of the rate were held on the 6th of April. A party desirous of appealing against the rate would therefore, if bound by law to bring his appeal to such April sessions, have had to give notice of appeal upon the 22nd of March, the day immediately succeeding that of the publication of the rate, in accordance with the provisions of 12 & 13 Vict. c. 45, s. 1, which requires fourteen clear days' notice to be given to the overseers. S. & Son gave notice of appeal against the rate on the 7th of June for the then next sessions, which were held on the 5th of July. The Court of quarter sessions refused to hear the appeal on the ground that it ought to have been brought to the April sessions:—*Held*, that an appellant against a poor rate is entitled to a reasonable time, before giving notice of appeal, to allow of his considering whether he shall appeal, and the grounds on which his appeal shall be based, and that one day is not a reasonable time for that purpose; and that con-

sequently S. & Son were not bound to give notice of appeal for the April sessions.—*Held*, further, that under the circumstances they were not even bound to enter and respite their appeal at the April sessions. THE QUEEN *v.* JUSTICES OF SURREY [Q. B. D. 100

2. —— *Maintenance by Relations — Grandmother—Married Woman with Separate Estate—43 Eliz. c. 2, s. 7—Married Women's Property Act (33 & 34 Vict. c. 93), s. 14.*] A woman whose husband is alive is not liable under the Poor Law Acts to contribute to the support of her grandchildren, even though she has separate estate and is able, independently of her husband, to support them. COLEMAN *v.* OVERSEERS OF BIRMINGHAM [Q. B. D. 615

3. —— *Parish—Union—Settlement—The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34, 44.*] "Parish" in s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), does not include "union." A pauper resided for more than three years in a union, residing continuously for more than two and less than three years of the period in one parish of the union and for more than one and less than two years of the period in another parish of the same union, in such manner and under such circumstances, as would in accordance with the several statutes in that behalf, render her irremovable:—*Held*, by Lindley and Mathew, JJ., that such a residence did not constitute a settlement within s. 34 of 39 & 40 Vict. c. 61. GUARDIANS OF PLOMESGATE UNION *v.* GUARDIANS OF WEST HAM UNION Q. B. D. 576

4. —— *Settlement — Abolition of Derivative Settlement—The Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 35.*] Where the settlement of a widowed mother, as well as the settlement of her legitimate children, who are unemancipated and under the age of sixteen, has to be inquired into, the children take the settlement of their widowed mother under the first clause of s. 35 of the Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61) and are not to be deemed to be settled in the parish where they were born under the last clause of that section, although it cannot be shewn what settlement the children derived from their widowed mother without inquiring into her derivative settlement.—So *held* by Lindley and Mathew, JJ. GUARDIANS OF HOLLINGBOURN UNION *v.* GUARDIANS OF WEST HAM UNION Q. B. D. 580

5. —— *Settlement by Residence under 39 & 40 Vict. c. 61, s. 34—Removal, Order of, made without Corroboration—Corroboration before Sessions on Appeal.*] An order of removal was made by justices in respect of an alleged settlement under 39 & 40 Vict. c. 61, s. 34, which provides that an order of removal in respect of a settlement acquired under that section shall not be made upon the evidence of the person to be removed without such corroboration as the justices or Court think sufficient. There was no corroborative evidence before the justices who made the order. Upon appeal to the quarter sessions against the order, the grounds of appeal were, first, that the pauper had not acquired a settlement under 39 & 40 Vict. c. 61, s. 34; and, secondly, that there was no corroborative evidence before the justices who made the order of removal. Corroborative evidence was tendered on behalf of the respondents at the sessions, and received by the Court, who considered the same sufficient, but quashed the order of removal on the ground that, as a matter of law upon the facts proved, the pauper had not acquired a settlement under 39 & 40 Vict. c. 61, s. 34:—*Held*, that the sessions were right in receiving the corroborative evidence, but that (the case being governed by *Reg.* v. *Brampton Union* (3 Q. B. D. 479)), they were wrong in holding that the settlement was not acquired, and that consequently the order of removal must stand good. THE QUEEN *v.* GUARDIANS OF ABERGAVENNY - - - - - Q. B. D. 31

6. —— *Settlement by Residence—Penitentiary —"Bonâ fide Charitable Gift"—9 & 10 Vict. c. 66, s. 1; 39 & 40 Vict. c. 61, s. 34.*] The pauper resided for upwards of three years in a building in the parish of F., occupied as a home or reformatory for women. This home was supported by money collected at church offertories without the parish and by annual subscriptions and donations from persons resident in all parts of the kingdom, the money being applied in providing for the supervision, instruction, maintenance, and clothing of the inmates. The pauper during the whole term paid no money for her maintenance and clothing:—*Held*, that her maintenance in the home was a "bonâ fide charitable gift" within the meaning of the exception to the proviso in 9 & 10 Vict. c. 66, s. 1, and that she was irremovable from and settled within the parish under 39 & 40 Vict. c. 61, s. 34. GUARDIANS OF FULHAM UNION *v.* GUARDIANS OF OF THANET - - - - Q. B. D. 610

POOR RATE—*Occupation—Sale of Grass on Land —Right of Grazing.*] The appellant was the owner of certain land, and such land being unlet, he sold the grass upon it by auction. The conditions of sale described the sale as a sale of grass for a certain time, and set forth certain conditions under which the purchasers were to be entitled to turn cattle in to eat the grass. The conditions also provided that the purchasers should dress the dung, cut the thistles, and leave the fences in good repair. It was a term of the sale that the vendor should pay the rates and taxes. The appellant was rated to the poor rate in respect of the land in question for a period coincident with part of the period for which the grass was sold. An application having been made to the justices to enforce the rate against him:—*Held*, that there was evidence that the appellant was the occupier of the land; that the effect of the sale of the grass was not to put the purchasers in occupation of the land, but merely to license them to graze their cattle thereon; and that, consequently, the appellant was liable to be rated. MOGG *v.* OVERSEERS OF YATTON - - - Q. B. D. 10

2. —— *Rateable Value—Refreshment Rooms at Railway Station — Rent reserved — Evidence of Actual Profits—Practice—Case stated by Sessions —Costs—Civil Proceedings—Rules of 1880, Order LXII., rule 2.*] The refreshment rooms upon a railway station having been let to a contractor for a term of years at a fixed annual rent, he appealed against a poor-rate made upon him as occupier of

POOR RATE—*continued.*
the premises, and at the hearing of the appeal sought to prove by his own testimony and by his account books, shewing the receipts and expenditure during the past year in respect of the refreshment rooms, that the business was carried on at a loss, and that the rent reserved did not represent the true annual value of the premises:—*Held*, that such evidence ought to have been received as an element in ascertaining the rateable value. *Reg.* v. *Guardians of North Aylesford* (37 J. P. 148) explained. Where a case is stated by sessions upon appeal against a poor-rate, the proceeding is a civil proceeding on the Crown side of the Queen's Bench Division, within the rules of 1880, Order LXII., rule 2, and the costs are in the discretion of the Court under Order LV. CLARK *v.* FISHERTON-ANGAR - - - **Q. B. D. 139**

3. —— *Sporting Rights—Woodland—Game—Rating Act*, 1874 (37 & 38 *Vict. c.* 45), *s.* 4, *sub-s.* (*a*).] The appellant was the owner and occupier of certain woodlands in respect of which he was rated to the poor-rate. He used the lands in question as plantations and woods and exercised the right of sporting over them. In the case of each piece of land a certain amount per acre was added to the rateable value of the land in respect of such right of sporting:—*Held*, that the right of sporting was properly taken into account in estimating the rateable value of the land in its natural and unimproved state. EYTON *v.* OVERSEERS OF MOLD - - - **Q. B. D. 13**

PRACTICE—*Attachment of Debts—Garnishee Order—Partnership Firm—Order XLV., rule* 2.] A garnishee order cannot be made under Order XLV., rule 2, attaching a debt due from a partnership firm described by its partnership name. WALKER *v.* ROOKE - - **Q. B. D. 631**

2. —— *Award—Time for Setting Aside—Notice of Motion*—9 & 10 *Wm.* 3, *c.* 15, *s.* 2.] An action having been referred to arbitration the award was published on the 14th of July. On the 24th of November (being the last day but one of the old Michaelmas Term) the defendants moved the Court to set aside the award, but the Court refused the application on the ground that notice of motion had not been given to the plaintiff as required by Order LIII., rules 3 & 4. The defendants afterwards on the same day served on the plaintiff a notice that on the 27th of November they would move the Court to set aside the award:—*Held*, on the authority of *In re Corporation of Huddersfield and Jacomb* (Law Rep. 17 Eq. 476; 10 Ch. 92) that the service of notice of motion on the 24th of November was a complaint made in the Court before the last day of the next term after the publication of the award within 9 & 10 Wm. 3, c. 15, s. 2, although no affidavit was filed before the last day, as had been done in that case. SMITH *v.* PARKSIDE MINING COMPANY [**Ex. D. 67**

3. —— *Case stated by Quarter Sessions for Opinion of Queen's Bench Division—Appeal to the Court of Appeal—Leave to Appeal when necessary—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 45.] Where the Queen's Bench Division in the exercise of its original common law jurisdiction affirms or quashes an order of sessions, an appeal lies to the

PRACTICE—*continued.*
Court of Appeal although no leave to appeal be given. THE QUEEN *v.* SAVIN (**C. A.**) **Q. B. D. 309**

4. —— *Costs—Claim and Counter-claim—Costs of the Cause—Judgment—Certificate of Associate.*] The Plaintiff claimed to recover commission due to him from the defendants on an agreement. The defendants denied the claim, and claimed by way of counter-claim 230*l.* 0*s.* 9*d.* for goods sold. The jury found a verdict for the plaintiff on the claim for 114*l.* 17*s.* 6*d.*, and a verdict for the defendants on the counter-claim for 230*l.* 0*s.* 9*d.* The judgment entered was "that the plaintiff recover against the defendants *l.* for his costs of suit," and "that the defendants recover against the plaintiff 115*l.* 3*s.* 3*d.* on the counter-claim and *l.* for their costs of the counter-claim":—*Held*, reversing the decision of Pollock, B., that on taxing the costs according to the judgment the plaintiff and not the defendants was entitled to the costs of the cause.—*Semble*, per Brett, L.J., that where there is a claim with issues on it and a counter-claim (which is not a set-off but is in the nature of a cross-action) with issues on it, and the plaintiffs succeeds on the claim, and the defendant succeeds on such counter-claim, the taxation, if not otherwise ordered, should be by taxing the claim as if it and its issues were an action, and by taxing the counter-claim as if it and its issues were also an action, and the allocatur for costs should be given for the balance in favour of the party in whose favour is such balance; the master on such taxation dividing items which are common to both actions. BAINES *v.* BROMLEY [(**C. A.**) **Ex. D. 197, 691**

5. —— *Costs—County Courts Admiralty Jurisdiction Act*, 1868—31 & 32 *Vict. c.* 71—*Rules of Court*, 1875—*Order LV., rule* 1.] Sect. 9 of the County Courts Admiralty Jurisdiction Act, 1868, which enacts that persons taking proceedings in a superior Court, which they might under s. 3 of that Act have taken in a county court, shall not be entitled to costs, unless the judge before whom the cause was tried shall certify that it was a proper cause to be tried in a superior Court, is inconsistent with and repealed by Order LV., rule 1, of the Rules of the Supreme Court, 1875. TENANT *v.* ELLIS - - - - **Q. B. D. 46**

6. —— *Costs—Reference with Costs to abide "Event"—General Award in favour of Defendant on Counter-claim—Reference back to find Specific Issues.*] The Plaintiff, who had built two houses for the defendant at a contract price of 1135*l.*, sued for 169*l.* 16*s.*, the balance of the price, and for other small items.—The defendant raised various defences, and also counter-claimed 1200*l.* for penalties for delay and for damages arising from bad work. The pleadings went as far as surrejoinder, after which the cause, with all matters in difference, was referred to an architect as arbitrator, upon the terms, inter alia, that the costs of action, reference, and award, should follow the event, unless the arbitrator should otherwise order. The arbitrator by an award, silent as to costs, awarded 3*l.* 2*s.* 6*d.* to the defendant in respect of the action and matters in difference:—*Held*, affirming the judgment of the Queen's Bench Division, that the word "event" ought to be construed distributively, and the award re-

PRACTICE—*continued.*

mitted to the arbitrator to find specific issues. ELLIS *v.* DESILVA - - **(C. A.) Q. B. D. 521**

7. —— *Costs—Higher Scale—Rules of Supreme Court (Costs), Order VI., rr.* 2, 3.] The Plaintiff brought an action for damages for an alleged trespass under a claim of right, and prayed an injunction to restrain the defendant from a repetition of it. The issue was one of considerable importance as between the parties, and involved a lengthened and expensive inquiry into the title of property which had been in the possession of the plaintiff's family for more than three centuries. Upon the trial (without a jury) the plaintiff obtained judgment for nominal damages:—*Held*, not a case in which the Court, in the exercise of its discretion under Order VI., rule 3, Rules of the Supreme Court (Costs) would order the costs to be taxed upon the higher scale.—*Semble*, that Order VI., rule 3, of the Rules of the Supreme Court (Costs) allowing costs upon the "higher scale" is not limited to costs in actions brought in the Chancery Division of the High Court, but gives the Common Law Divisions a discretionary power to order costs to be taxed upon the higher scale, even though the cause of action involves no equitable element. DUKE OF NORFOLK *v.* ARBUTHNOT **[C. P. D. 279**

8. —— *Costs—Short-hand Notes of Evidence at Trial—Special Direction.*] It is competent to this Court to make an order for the allowance, on taxation between party and party, of the expense of the short-hand notes of the evidence given at the trial, as part of the costs of a rule for a new trial on the ground that the verdict was against the weight of evidence, in a case where from the nature and extent of the evidence it is manifest that the matter could not have been properly disposed of without their aid. WATSON *v.* GREAT WESTERN RAILWAY COMPANY - **C. P. D. 163**

9. —— *Costs as between Solicitor and Client—Limit where not more than 20l. claimed—County Court Act*, 1856 (19 *&* 20 *Vict. c.* 108), *s.* 36.] The 36th section of the County Court Act, 1856, which fixes a limit to costs, as between solicitor and client, in actions where not more than 20*l.* is claimed, applies to county court actions only. IN RE COPP - - - **(C. A.) C. P. D. 607**

10. —— *County Court, Appeal from*—38 *&* 39 *Vict. c.* 50, *s.* 6—*Omission to request Judge to take Note—Application to compel Judge to sign Note actually taken.*] The Court will not order a county court judge to sign notes, which he may have taken at a trial, in order that they may be used on appeal under 38 & 39 Vict. c. 50, s. 6, when the judge was not requested to take a note of any specific question of law raised at the trial, and of the facts in relation thereto, in conformity with the above-mentioned section. MORGAN *v.* REES - - - - - **Q. B. D. 89**

11. —— *County Court, Appeal*—38 *&* 39 *Vict. c.* 50, *s.* 6—*Request to Judge to take a Note—Application to compel Judge to sign Note or to hear Case—Adjournment of Trial in County Court—Order XXXVII., rule* 26 *of County Court Rules*, 1875—*Appeal*—19 *&* 20 *Vict. c.* 108, *s.* 44.] Rule 26 of Order XXXVII. of County Court Rules, 1875, which enables parties to a county court action, "at any time before the action is called on, by consent and without payment of any trial fee, to postpone the trial to such subsequent court as the judge shall direct," does not enable such parties to adjourn the trial without the consent of the judge; and therefore where, after a cause has been adjourned by the judge, the parties by agreement amongst themselves further adjourn the trial without the sanction of the judge, he has jurisdiction to hear and dispose of the cause as if there had been no such further adjournment.—A request to a county court judge, at the commencement of the trial, and before any specific question of law has been raised, that he should take a note of the evidence, as it was an important case and might go to the superior Court, is not a sufficient request within the meaning of s. 6 of the County Court Act, 1874 (38 & 39 Vict. c. 50); and therefore a note which the judge afterwards took, and which he stated was an incomplete one, and not such as he would have taken if he had been requested to take a note of any specific question of law and of the evidence in relation thereto, is not a note taken under that section which the Court will order him to sign.—The right to appeal from an order of a divisional Court, discharging a rule for an order on a county court judge to hear an action, is not taken away because s. 44 of 19 & 20 Vict. c. 108, which substitutes such rule for a mandamus to the county court judge, enacts that, where any superior Court shall have refused such rule, no other superior Court shall grant it. MORGAN *v.* REES **[(C. A.) Q. B. D. 508**

12. —— *Interpleader Issue—Jurisdiction of Judge to try without Jury—*1 *&* 2 *Wm.* 4, *c.* 58—*Order I., rule* 2—*Order XXXVI., rules* 2 *&* 3.] An interpleader issue cannot be tried by a judge without a jury in pursuance of a notice of that mode of trial, under Order XXXVI., rules 2 and 3. HAMLYN *v.* BETTELEY - - **(C. A.) Ex. D. 63**

13. —— *Judgment Creditor—Elegit—Equity of Redemption—Application for Receiver—Interlocutory Order — Judicature Act*, 1873, *s.* 25, *sub-s.* 8.] The words "interlocutory order" in s. 25, sub-s. 8 of the Judicature Act, 1873, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than final judgment in an action, whether such order be made before judgment or after.—A creditor who had recovered judgment in an action sued out a writ of elegit, to which writ the sheriff returned that there were no goods or lands of the debtor which he could deliver. It appearing, however, that the debtor was entitled to an equity of redemption of certain land, the creditor, without commencing any fresh action for the purpose, made an application to a judge at chambers for the appointment of a receiver:—*Held*, that such application was rightly made in the original action, and that it was unnecessary to commence a new action for the purpose. SMITH *v.* COWELL - - - **(C. A.) Q. B. D. 75**

14. —— *Order dismissing Action for want of Prosecution—Appeal from Order—Power to enlarge Time — Order LVII., rule* 6.] A judge has jurisdiction under Order LVII., rule 6, to enlarge the time for appealing against an order dismissing the action for want of prosecution, even after the

PRACTICE—*continued.*

order has taken effect and the action has therefore become dismissed; and he has also jurisdiction when he has so enlarged the time for appealing to vary or amend the order dismissing the action, and in the exercise of such jurisdiction his discretion is not limited by any fixed or arbitrary rules. CARTER *v.* STUBBS - - (C. A.) C. P. D. 116

15. —— *Pleading — Action for Recovery of Land—Defence that Defendant is in possession of Land— Omission to deny Plaintiff's Title —Rules of Court*, 1875, *Order XIX., rule* 15.] In an action for the recovery of land a defence simply alleging that the defendant is in possession thereof, operates as a denial of the plaintiff's title and requires him to prove the truth of the allegations in the claim. DANFORD *v.* MCANULTY [(C. A.) Ex. D. 645

16. —— *Pleading—Breach of Promise of Marriage—Special Damage—Matter of Aggravation—Averment of — Rules of Court*, 1875, *Order XIX., rule* 4; *Order XXVII., rule* 1.] A statement of claim, after alleging a promise by the defendant to marry the plaintiff, went on to allege in paragraph 4, that, "the plaintiff relying upon the said promise permitted the defendant to debauch and carnally know her, whereby the defendant infected her with a venereal disease." It then alleged a breach of the said promise. An order having been made at chambers, to strike out paragraph 4 of the claim:—*Held*, reversing the decision of the Common Pleas Division, that the order was wrongly made, and upon two grounds; first, that the facts alleged in the paragraph complained of, were "material facts" within the meaning of Order XIX., rule 4, and as such were properly pleadable; and secondly, that, even if they were not, the Court had no power to strike the paragraph out, the statements therein neither being scandalous nor tending to prejudice or embarrass the fair trial of the action within the meaning of Order XXVII., rule 1. MILLINGTON *v.* LORING [(C. A.) C. P. D. 190

17. —— *Set-off—Liability of Surety — Debt due to Principal.*] Action on a covenant to pay all liabilities which the plaintiff might incur under a deed of assignment made between the plaintiff and other parties. The defendant pleaded that the covenant was the joint and several covenant of himself and one Wilson, and that, before action the plaintiff was indebted to Wilson in an amount exceeding the plaintiff's claim against the defendant; and that Wilson had assigned the plaintiff's debt to himself and the defendant in equal shares as tenants in common. As to one half of the plaintiff's claim the defendant claimed to set off one half of the debt so assigned, and as to the other half, the defendant said that he was entitled to be exonerated by his co-surety Wilson, and to call upon him to contribute in equal shares to the payment of the plaintiff's claim, and was entitled to set off the share remaining vested in Wilson against this part of the plaintiff's claim:—*Held*, by Watkin Williams and Mathew, JJ., that the defence was no answer to the plaintiff's claim. BOWYEAR *v.* PAWSON [Q. B. D. 540

18. —— *Sheriff's Officer—Abortive Execution —Possession Money—Who liable to pay.*] The solicitors of a judgment creditor, in the course of their duty as such solicitors, lodged a writ of fi. fa. at the office of the sheriff, with a request for execution, giving however no instructions as to the selection of any particular bailiff. The sheriff employed one of his officers to execute the writ, which the officer thereupon proceeded to do. On an action being brought by such sheriff's officer against the solicitors of the judgment creditor to recover his fees for executing the writ:—*Held* (affirming the judgment of Bowen, J.), that the solicitors were not liable to pay the fees; that the law, apart from a contract to pay them (express or implied), cast no such liability upon them; and that, from the mere fact that they in the ordinary course of their duty lodged the writ at the sheriff's office for execution, no such contract could be implied.—*Maybery* v. *Mansfield* (9 Q. B. 754) followed.—*Brewer* v. *Jones* (10 Ex. 655) dissented from. ROYLE *v.* BUSBY - (C. A.) Q. B. D. 171

19. —— *Solicitor and Client—Lien for Costs —Charging Order—"Property recovered or preserved"—Jurisdiction of Judge at Chambers—23 & 24 Vict. c.* 127, *s.* 28— *Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 39.] The defendant having paid money into court in the action, the plaintiff's solicitor declined to proceed with the action, except on terms to which the plaintiff would not assent. Thereupon the plaintiff retained fresh solicitors and obtained an order for a change of solicitors. After the order was made the solicitor obtained a judge's order at chambers charging the money in court with his costs in the action:—*Held*, by Grove and Lindley, JJ., 1, that when an action is pending a judge at chambers has jurisdiction to make such an order; 2, that the money in court was "property recovered or preserved" within 23 & 24 Vict. c. 127, s. 28; 3, that the order was valid though the plaintiff's solicitor had ceased to be such when it was made; 4, that though he had discharged himself from the position of plaintiff's solicitor, yet as he had not done so wrongfully or improperly the order was right. CLOVER *v.* ADAMS - - - Q. B. D. 622

—— Case stated by sessions—Costs - 139
See POOR-RATE. 2.

PRESUMPTION—Duration of life - - 366
See CRIMINAL LAW—BIGAMY.

PRINCIPAL AND AGENT—Ship's necessaries—Managing owner—Authority - 93
See SHIP. 2,

—— Warranty of authority—Building society
See BUILDING SOCIETY. [696

PRISON—*Prisons Act*, 1877 (40 & 41 *Vict. c.* 21), *ss*, 4, 57—*Maintenance of Prisons and of Prisoners therein—Expenses of conveying to Prison — Liability of Secretary of State for.*] A metropolitan police magistrate, having summarily convicted an offender and adjudged her to be imprisoned, made out a warrant for her commitment; in obedience to which warrant the plaintiff, a police constable, duly conveyed her to prison. By reason of such conveyance the plaintiff incurred certain expenses which the prisoner had no means to defray. The magistrate subsequently made an order under 27 Geo. 2, c. 3, directed to the defendant, ordering him to pay to the plaintiff the amount of such

PRISON—*continued.*
expenses. The defendant refused to comply with the order, on the ground that the liability to pay the expenses of conveying prisoners to prison had been transferred from the county to the Secretary of State by s. 4 of the Prisons Act, 1877, which provides that, "After the commencement of the Act all expenses incurred in respect of the maintenance of prisons to which the Act applies and of the prisoners therein shall be defrayed out of moneys provided by Parliament." A similar question arose with regard to the expenses of conveying from the police court to the prison a man committed to take his trial for felony:—*Held*, reversing the decision of the Court below, that the expenses of conveying prisoners to prison were by s. 4 transferred to the Secretary of State, and that the word "therein" in that section pointed to the class of prisoners to whose maintenance the Act was intended to apply, not to the period of time from which the liability for such maintenance was to commence. MULLINS *v.* TREASURER OF SURREY [(C. A.) Q. B. D. 156

PRIVILEGE—Witness—House of Commons 307
See DEFAMATION.

PROHIBITION—General demurrer - 586
See RAILWAY

RAILWAY—*Company — Regulation of Railways Act*, 1873 (36 & 37 *Vict. c.* 48)—*Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31)—*Jurisdiction of Railway Commissioners — Demurrer.*] The Railway Commissioners, to whom has been transferred the jurisdiction of the Court of Common Pleas under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), have under that Act jurisdiction to hear and determine a complaint against a railway company of not, according to its powers, affording all reasonable facilities for receiving, forwarding, delivering passengers and other traffic at and from any of its stations which are used by the company for such passengers or other traffic; and although the commissioners have no jurisdiction to order the company to make a new railway station, or to order any particular works, or otherwise to interfere with the discretion of the company in the mode of performing its obligation to afford such facilities, according to its powers, for the receiving, forwarding, and delivering of the traffic, yet they have jurisdiction to order such facilities, even if their doing so would necessitate the making by the company of some structural alteration of such station.—If the Railway Commissioners act beyond their powers, prohibition will lie, notwithstanding the power of the Court of Common Pleas over railways under 17 & 18 Vict. c. 31, was transferred to such commissioners by 36 & 37 Vict. c. 48.—In a declaration in prohibition by a railway company against the Railway Commissioners it appeared that a complaint, under the Railway and Canal Traffic Act, 1854, had been made to the commissioners against the company, and that the commissioners proposed to order certain things to be done by the company in respect of such complaint, and that the company denied the jurisdiction of the commissioners to hear and determine the complaint or any part of it, and prayed for a writ to prohibit the commissioners "from further proceeding in any way touching the premises before them."—The Court, being of opinion that the commissioners had jurisdiction over the general matter of the complaint, and that they had jurisdiction to order some of the things they proposed ordering, though not to order the others:—*Held* (Brett, L.J., dissenting), that a general demurrer by the commissioners to the whole declaration should be allowed. SOUTH EASTERN RAILWAY COMPANY *v.* MAYOR OF HASTINGS - - - (C.A.) Q. B. D. 586

2. —— *Execution by Judgment Creditor—Protection of Rolling Stock and Plant—The Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *ss.* 4, 23.] The protection from seizure in execution by a judgment creditor, given by the Railway Companies Act, 1867, s. 4, to the rolling stock and plant of a railway, after such railway is open for public traffic, continues although the railway is afterwards closed for traffic. MIDLAND WAGGON COMPANY *v.* THE POTTERIES, SHREWSBURY AND NORTH WALES RAILWAY COMPANY - Ex. D. 36

3. —— *Company — Liability to fence against adjoining Lands—Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 68—*Injury to Cattle—Owner releasing Right to accommodation Works—Rights of Occupier.*] The plaintiff in 1846 became tenant from year to year of land belonging to one G. In 1847, the defendants, a railway company, acquired part of the land in the exercise of their statutory powers, and by arrangement with G. paid him compensation in lieu of all accommodation works, including the right to have his land fenced from the railway, G. releasing the defendants from their statutory obligation in that respect. The defendants, however, made a sufficient fence (consisting of posts and rails, a ditch, and a quickset hedge) between the railway and the land so occupied by the plaintiff, but neglected to keep up the posts and rails, and in consequence of their defective and dangerous condition a cow belonging to the plaintiff, in 1879, whilst the plaintiff so continued in the occupation of the land, fell into the ditch and was killed:—*Held*, that the defendants were liable, for that their arrangement with the owner did not exonerate them from their liability under the Railways Clauses Act (8 & 9 Vict. c. 20), s. 68, to maintain the fence and ditch for the benefit of the occupier, and so as to prevent his cattle from straying from the land. CORRY *v.* GREAT WESTERN RAILWAY COMPANY - - - - - C. P. D. 237

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REVENUE — *Inhabited House Duty — Dwelling-house let in different Tenements — Occupation of part by Landlord* — 41 *Vict. c.* 15, *s.* 13.] By 41 Vict. c. 15, s. 13, where any house being one property is divided into, and let in, different tenements, and any of such tenements are occupied

solely for the purposes of any trade or business, or of any profession or calling, by which the occupier seeks a livelihood, or profit, or are unoccupied, inhabited house duty is to be assessed as if the house comprised only the tenements other than those so occupied as aforesaid, or unoccupied; and a house or tenement occupied solely as aforesaid is exempt although a servant or other person may dwell in such house or tenement for the protection thereof.—A house had one entrance into the street, and the rooms in it opened on a hall, passages, and staircase, common to all the tenants. Some of the rooms on the ground floor were occupied by the landlords, the appellants, as offices, and the remainder and the rooms on the first floor were let to tenants who occupied them as offices. The rooms on the second floor were occupied partly by tenants who resided, and the remainder by a caretaker and his wife, who acted as servants to the residents, and cleaned the several portions occupied by the appellants as offices or let off. The appellants claimed relief from being assessed on the portions used as offices:—*Held*, by Grove and Lindley, JJ., that the portions so used were not exempt, as the exemption applies to houses let in separate and distinct tenements each complete in itself, and not to rooms in a house.—Per Grove, J., that there was a common use of the landlords and the residents and other tenants for residential purposes which excluded the exemption.—Per Lindley, J., that since the landlords occupied part of the house, otherwise than as caretakers, the house was not divided into and let in different tenements within the statute. YORKSHIRE FIRE AND LIFE INSURANCE COMPANY *v.* CLAYTON - - - - **Q. B. D. 557**

2. —— *Inhabited House Duty — Exemption — "Servant or other Person"*—32 & 33 *Vict. c.* 14, *s.* 11.] The respondent was a hop-merchant, and was possessed of certain houses having an internal communication throughout, and used for the purposes of his trade. K. lived in the houses in order to take care of them, but he was a clerk in the respondent's employ at a salary of 150*l.* a year, and he resided in the houses together with his wife, children, and servant:—*Held*, that K. was not "a servant or other person" within the meaning of 32 & 33 Vict. c. 14, s. 11, and that the respondent was not exempt from inhabited house duty in respect of the houses. YEWENS *v.* NOAKES **[(C.A.) Ex. D. 530**

3. —— *Inhabited House Duty — Exemption — "Servant or other Person"*—41 *Vict. c.* 15, *s.* 13, *part* 2.] The respondents, wholesale clothiers, were possessed of premises the whole of which were used as warehouses and counting-houses, except a sitting-room and bedroom on the top storey occupied by their cashier, who had a salary of 200*l.* a year, and who slept on the premises solely as caretaker and for their protection, this being considered as part of his duty:—*Held*, that the Income Tax Commissioners were warranted in finding that the cashier was "a servant or other person" within 40 Vict. c. 15, s. 13, part 2, and that the premises were accordingly exempt from house duty.—*Yewens* v. *Noakes* (6 Q. B. D. 530) explained - - - - **Q. B. D. 673**

4. —— *Railway Passengers Duty*—5 & 6 *Vict. c.* 72, *s.* 2—*Conveyance of Passengers—Duty upon Sums charged to cover Duty—Duty upon Sum charged for Sleeping Accommodation.*] By the 2nd section of 5 & 6 Vict. c. 79, and the schedule to that Act, a duty at the rate of 5 per cent. is made payable upon all sums received or charged for the hire, fare, or conveyance of passengers conveyed for hire upon any railway. The defendants, by a local Act, were prohibited from charging to their passengers more than certain specified sums per mile, which sums were to include all expenses incidental to their conveyance, except government duty. The defendants, in addition to the sum charged by them to their passengers for conveyance, charged to and received from such passengers a further sum at the rate of 5 per cent. on the former, to cover the government duty. The Crown claimed duty on the latter sum as well as on the former:—*Held*, affirming the decision of the Exchequer Division, that the Crown was entitled to duty on the whole amount received from the passengers, even though such amount should exceed the maximum charge for conveyance fixed by the local Act.—The defendants attached to certain of their night trains sleeping carriages for the accommodation of such of their first-class passengers as might choose to avail themselves of it. For the use of these carriages such passengers were charged an extra sum in addition to the ordinary first-class fare. In addition to couches with pillows, sheets, and blankets, each carriage contained a lavatory, water-closet, and other conveniences. Passengers using such carriages were not disturbed during the night by demands for their tickets; and if they arrived at their destination in the middle of the night the carriage was put into a siding, and the passengers allowed to remain in their beds until the morning. A special servant was employed to wait upon them, call them in the morning, and bring them hot water. The Crown claimed duty upon the sums charged to passengers for the accommodation provided in the sleeping carriages:—*Held*, affirming the decision of the Exchequer Division, that such accommodation was incidental to the conveyance of the passengers, and that the Crown was entitled to the duty claimed. ATTORNEY GENERAL *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY **[(C.A.) Ex. D. 216**

5. —— *Succession Duty—Appointment by Donee of General Power—Predecessor—Legacy Duty—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *ss.* 2, 18—36 *Geo.* 3, *c.* 52, *s.* 18.] In cases of appointments by donees of general powers which fall within s. 2, and do not fall within s. 4 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), the canon of construction adopted in *In re Barker* (7 H. & N. 109; 30 L. J. (Ex.) 404) and *Charlton* v. *Attorney General* (4 App. Cas. 427) is to be applied whether the power be joint or sole, and the appointees must be held to derive their interest from the donor of the power as "predecessor," and not from the donee.—Testator, in 1826, bequeathed personalty in trust for his daughter for life, and afterwards (in the event which happened) for such persons as she should by deed appoint, and in default of appointment for her next of kin. Testator died before the

REVENUE—*continued.*
coming into operation of the Succession Duty Act, 1853, and legacy duty at 1 per cent. was paid upon the whole absolute interest of the trust fund. After that Act came into operation the daughter, by deed, appointed the trust fund to her sister's daughters:—*Held*, by Grove and Lindley, JJ., that, as owing to the date of the testator's death s. 4 did not apply, the appointees derived their interest from their grandfather, the testator, as predecessor, within s. 2, and not from their aunt, the appointor, and that succession duty was therefore payable on their succession at the death of the appointor, at 1 and not at 3 per cent.—*Held*, also, that the payment of legacy duty under 36 Geo. 3, c. 52, s. 18, did not exempt the appointees from succession duty, since their succession did not come within the exemption granted by s. 18 of the Succession Duty Act, 1853, to persons already charged with legacy duty "in respect of the same acquisition of the same property." ATTORNEY GENERAL *v.* MITCHELL [Q. B. D. 548

6. —— *Succession Duty—Predecessor—Succession Duty Act*, 1853 (16 & 17 *Vict. c.* 51), *s.* 2.] A lunatic was tenant in tail in possession of land with remainder to his younger brother R. and his sister D. successively in tail. R. converted his estate tail into a base fee in remainder, and mortgaged his interest to secure a debt of 124,000*l.* which was more than the fee simple value of the land, so that he had no beneficial interest in the equity of redemption. His sister D. married, and by her marriage settlement made before such marriage her estate in remainder was settled to the use of herself for life, with remainder to the use of the first and other sons of such marriage. The defendant was the only son of that marriage. For the benefit of all parties a family arrangement was made with the consent of the Lord Chancellor (as protector and in lieu of the lunatic under 3 & 4 Wm. 4, c. 74, s. 33), in pursuance of which R. and his sister D. and the mortgagees all joined in deeds of settlement, whereby the land was conveyed to trustees in fee simple, subject to the estate tail of the lunatic, but discharged from the mortgage and from the equity of redemption of R. upon trust after the determination of the lunatic's estate to raise 37,000*l.* by sale or mortgage, and to pay that sum to the mortgagees, and subject thereto to hold the land to the use of D. for life with remainder to her sons successively in tail. This arrangement was carried out, and upon the death of the lunatic D. became tenant for life in possession and upon her death the defendant, as her son, became tenant in tail in possession:—*Held*, that the defendant derived his interest as successor from his mother D. and not from his uncle R. as predecessor, under the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2, and was therefore liable to duty at 1*l.* per cent., and not at 3*l.* per cent. ATTORNEY GENERAL *v.* DOWLING - - - (C. A.) Ex. D. 177

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RULES of 1880, Order LXII., r. 2 - - 139
See POOR-RATE. 2.

SALE OF GOODS—*Bill of Lading—Title of First Indorsee—Production of Unindorsed Copy—Warehouseman, Liability of.*] Goods having been shipped for London consigned to C. & Co., the captain signed a set of three bills of lading, marked "first," "second," and "third," respectively, making the goods deliverable "to C. & Co. or their assigns, freight payable in London, the one of the bills being accomplished, the rest to stand void." During the voyage C. & Co. indorsed the bill of lading marked "first" to the plaintiffs for valuable consideration. Upon the arrival of the ship at London, C. & Co. entered the goods consigned to them, and they were landed and placed in the custody of the defendants in their warehouses; the captain lodging with the defendants notice under the Merchant Shipping Act, 1862, to detain the cargo until the freight should be paid. C. & Co. then produced to and lodged with the defendants the "second" of the bills of lading. The defendants accordingly entered C. & Co. in their books as enterers, importers, and proprietors of the goods and, the stop for freight being afterwards removed, they delivered the goods to various persons upon delivery orders signed by C. & Co.:—*Held*, by Bramwell and Baggallay, L.JJ. (Brett, L.J., dissenting), that the defendants had not been guilty of a conversion, and that no action could be maintained against them by the plaintiffs. Judgment of Field, J. (5 Q. B. D. 129), reversed. GLYN, MILLS, CURRIE, & Co. *v.* EAST AND WEST INDIA DOCK COMPANY - - - (C. A.) Q. B. D. 475

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SET-OFF—Principal and surety—Debt due to principal - - - - 540
See Practice. 17.

SHERIFF—Possession money—Abortive execution - - - - - 171
See Practice. 18.

SHIP—*Demurrage—Loading and Unloading at fixed daily Rate—Right to include whole Time occupied in Loading and Unloading.*] By charter-party between the plaintiff and the defendants it was agreed that the plaintiff's ship should proceed to Bilbao and there load a full and complete, or part, cargo of iron ore, and deliver the same at Middlesborough. "400/500 tons per working day (Sundays and holidays excepted) to be allowed the charterers for loading, and 300 discharging, all demurrage over and above the said days at the rate of 2*s.* per hour for every 100 tons cargo. The lay days to commence day after arrival, and being ready to load or discharge respectively. The captain to have a lien on the cargo for freight or demurrage." "If the ship is loaded at other than Portugalette or Lucana shipping staithes, the loading and discharging to be at the rate of 300 tons per working day."—The vessel having loaded at a place other than those last mentioned at a rate less than 300 tons per working day, proceeded to Middlesborough, where she discharged her cargo at a higher rate per day:—*Held*, that, in calculating the demurrage, the days for loading and unloading must be kept separate, and that the charterers had no right to add together the whole number of days occupied in loading and unloading for the purpose of ascertaining the average amount of work done on each day. Marshall *v.* Bolckow, Vaughan, & Co. **C. P. D. 231**

2. —— *Managing Owner—Entry on Register as—Authority to bind other Owners—Ship's Necessaries.*] W. was the registered owner of certain shares in a ship, and had been entered on the register as managing owner. The defendant subsequently became the registered owner of other shares in the ship. The defendant was not aware in fact that W. was so registered as managing owner. W. sent the ship on a voyage without the defendant's knowledge, and contrary to the terms of an agreement made between them. The defendant did not participate in the adventure, and had previously informed W. that he did not intend to navigate the ship or take any part in her management. The plaintiffs supplied necessaries for the ship previous to such voyage, upon the order of W. without the knowledge or consent of the defendant. The plaintiffs, before supplying the goods, consulted the register, and found the defendant's name entered therein as part owner of the ship:—*Held*, by Bowen, J., that the fact that the defendant had allowed the entry on the register describing W. as managing owner to remain unaltered did not per se amount to a holding out of W. as his agent, so as to render the defendant liable for the necessaries supplied by the plaintiffs, and that inasmuch as W. had not in fact authority to bind the defendant, the plaintiffs could not recover against the defendant for such necessaries. Frazer & Co. *v.* Cuthbertson **[Q. B. D. 93**

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TELEGRAPH —*Telephone—Postmaster-General—Telegraph Act*, 1863 (26 & 27 *Vict. c.* 112), *s.* 3; 1868 (31 & 32 *Vict. c.* 110); *and* 1869 (32 & 33 *Vict. c.* 73), *ss.* 3, 4, 5, 6.] Edison's telephone, for which patents were granted in 1877 and 1878, consists of a transmitter, a wire, and a receiver. When sounds are spoken into the transmitter, electric currents of varying intensity pass along the wire, so that corresponding or equivalent sounds are heard at the receiver, and two persons at a distance can thus converse with one another. A company leased these telephones to subscribers at yearly rents which produced a profit to the company, and arranged the wires so that subscribers could converse with one another when put into communication by a servant of the company: —*Held*, that Edison's telephone was a "telegraph" within the meaning of the Telegraph Acts, 1863 and 1869, although the telephone was not invented or contemplated in 1869.—*Held*, also that a conversation through the telephone was a "message," or at all events a "communication transmitted by a telegraph," and therefore a "telegram" within the meaning of those Acts; and that since the company made a profit out of the rents, conversations held by subscribers through their telephones were infringements of the exclusive privilege of transmitting telegrams granted to the Postmaster-General by the Act of 1869, and were not within the exceptions mentioned in s. 5. THE ATTORNEY-GENERAL *v.* EDISON TELEPHONE COMPANY OF LONDON - - - **Ex. D. 244**

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TRAMWAY—*Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *s.* 54—*User of Wheels substantially flanged.*] Sect. 54 of the Tramways Act, 1870 (33 & 34 Vict. c. 78), prohibits the user of the tramway by unlicensed persons with carriages "having flange-wheels or other wheels suitable only to run on the rail of such tramway." The appellant, an omnibus proprietor, attached to his vehicle a lever with arms having a small revolving disc or roller which the driver might drop into the groove of the rail at the lower side of each fore-wheel when on the tramway, such discs operating when down as a flange at the point of contact with the rails, but when withdrawn by means of the lever leaving the vehicle free to travel over any part of the road:—*Held*, that this contrivance (though no obstruction to the tramway) was within the prohibition of the statute. COTTAM *v.* GUEST
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WILL—*Attesting Witness*—1 *Vict. c.* 26, *s.* 15—*Marriage of Devisee after Attestation to attesting Witness.*] Under the Wills Act (1 Vict. c. 26), s. 15, the marriage, after attestation of a will, of a devisee to the attesting witness, does not affect the validity of the devise. THORPE *v.* BESTWICK - - - - - **Q. B. D. 311**

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